



ALERTS

SEC Amends Section 13 Beneficial Ownership Reporting Rules, Issues Related Guidance

October 19, 2023

Highlights

The Securities and Exchange Commission (SEC) has adopted shorter filing deadlines for Schedules 13D and 13G

The new deadline rules will require a focused compliance effort by investment managers and others who report beneficial ownership under Section 13 of the Exchange Act

The SEC refrained from adopting proposed new rules concerning “group” formation and cash-settled equity derivatives, instead issuing guidance on those topics

On Oct. 10, 2023, the U.S. Securities and Exchange Commission (SEC) adopted [significant amendments](#) to the beneficial ownership reporting rules under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (the Exchange Act).

At the heart of the amendments is a shortening of the various filing deadlines for initial and amended Schedules 13D and 13G. These changes are generally consistent with (although in some cases are not as severe as) the [amendments originally proposed](#) by the SEC in 2022. The SEC believes the tightened reporting deadlines are appropriate to reflect

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technological changes that have occurred since the original deadlines were adopted, and are needed to reduce information asymmetries in the U.S. public equities market. The adopting release also contains a handful of less substantial rule amendments.

In addition, the adopting release sets forth SEC guidance on certain other issues relating to beneficial ownership. This guidance expresses the SEC's views on topics with respect to which the SEC proposed but ultimately declined to adopt new rules.

The rule amendments and the SEC guidance:

- accelerate the filing deadlines for initial and amended Schedules 13D and 13G
- clarify Schedule 13D disclosure requirements concerning derivative securities, including cash-settled derivative securities, that use an issuer's equity as a reference security
- discuss the circumstances in which parties to a cash-settled derivative security (other than a security-based swap) may be deemed to have beneficial ownership of reference securities
- describe the SEC's views on Section 13 "group" formation, including illustrative examples in the shareholder engagement context

The rule amendments will become effective 90 days after publication of the adopting release in the Federal Register. Investors must comply with the new Schedule 13G filing deadlines beginning on Sept. 30, 2024. Schedule 13D filers do not benefit from a similar phase-in.

Background

Prior to the new amendments, the filing deadlines for Schedules 13D and 13G had remained unchanged since the original adoption of those reporting forms in 1968 and 1977, respectively. A variety of commentators in recent years have urged the SEC to update those deadlines to reflect the subsequent radical increase in the size, speed, and complexity of the U.S. equity markets. Observers similarly have noted that technology improvements (including the advent of the EDGAR system) have dramatically reduced the time required for a reporting investor to prepare a Schedule 13D or 13G and get it on file with the SEC.

The amended reporting rules generally correspond to those themes, with the SEC casting the shortened filing deadlines as a means to provide the market with more timely information about accumulations of significant equity positions in public issuers. At the same time, the SEC has attempted to balance the market's interest in receiving prompt information against the practical challenges reporting persons will face in preparing their Schedules 13D and 13G under increased time pressure. One notes in this regard that certain of the newly adopted deadlines for amending Schedules 13D and 13G are not as strict as originally proposed.

The SEC backed away from certain proposals that had generated significant public comment and likely would have posed difficult interpretive challenges for some market participants. These included

proposed new rules regarding group formation and beneficial ownership of securities underlying cash-settled equity derivatives. The adopting release instead includes SEC guidance on those subjects.

Accelerated Filing Deadlines for Schedules 13D and 13G

Investors with beneficial ownership positions substantial enough to require reporting on Schedule 13D or 13G now face a more rapid deadline environment. The chart summarizes the new filing deadlines in comparison to the prior requirements.

Schedule 13D	Prior Requirement	New Requirement
Initial Filing Rules 13d-1(a), (e), (f) and (g)	Within 10 days after acquiring more than 5% beneficial ownership or losing eligibility to file on Schedule 13G.	Within <u>five business days</u> after acquiring more than 5% beneficial ownership or losing eligibility to file on Schedule 13G.
Amendment Rule 13d-2(a)	Promptly after material change in the facts set forth in prior Schedule 13D.	Within <u>two business days</u> after material change in the facts set forth in prior Schedule 13D.
Schedule 13G	Prior Requirement	New Requirement
Initial Filing – QII Rule 13d-1(b)(2)	Within 45 days after end of calendar year in which beneficial ownership exceeds 5% as of last day of such year; or Within 10 days after end of month in which beneficial ownership exceeds 10% as of last day of such month.	Within 45 days after end of <u>calendar quarter</u> in which beneficial ownership exceeds 5% as of last day of such quarter; or Within <u>five business days</u> after end of month in which beneficial ownership exceeds 10% as of last day of such month.
Initial Filing – Passive Investor Rule 13d-1(c)	Within 10 days after acquiring more than 5% beneficial ownership.	Within <u>five business days</u> after acquiring more than 5% beneficial ownership.
Initial Filing – Exempt Investor Rule 13d-1(d)	Within 45 days after end of calendar year in which beneficial ownership	Within 45 days after end of <u>calendar quarter</u> in which beneficial ownership

	exceeds 5% as of last day of such year.	exceeds 5% as of last day of such quarter.
Amendment – All 13G Filers Rule 13d-2(b)	Within 45 days after end of calendar year if, as of the end of that calendar year, there are any changes in the information reported in prior Schedule 13G.	Within 45 days after end of <u>calendar quarter</u> if, as of the end of that calendar quarter, there are <u>any material changes</u> in the information reported in prior Schedule 13G.
Amendment – QII Rule 13d-2(c)	Within 10 days after end of month in which beneficial ownership exceeds 10% as of last day of such month; and thereafter, within 10 days after end of month in which beneficial ownership increased or decreased by more than 5% of class as of last day of such month.	Within <u>five business days</u> after end of month in which beneficial ownership exceeds 10% as of last day of such month; and thereafter, within <u>five business days</u> after end of month in which beneficial ownership increased or decreased by more than 5% of class as of last day of such month.
Amendment – Passive Investor Rule 13d-2(d)	Promptly after acquiring more than 10% beneficial ownership; and thereafter, promptly after increasing or decreasing beneficial ownership by more than 5% of class.	Within <u>two business days</u> after acquiring more than 10% beneficial ownership; and thereafter, within <u>two business days</u> after increasing or decreasing beneficial ownership by more than 5% of class.

Schedule 13D

Schedule 13D is the default reporting form for an investor that has acquired more than 5 percent beneficial ownership of a class of voting equity securities registered under Section 12 of the Exchange Act (a covered class).

Initial Filing

Historically, an investor has been required to make its initial Schedule 13D filing within 10 calendar days after (i) acquiring more than 5 percent beneficial ownership of a covered class or (ii) if it has previously been reporting its position on Schedule 13G, losing its eligibility to continue doing so. The amendments reduce this initial Schedule 13D filing

deadline to five business days. (1)

Amended Filing

Until now, an investor has been required to amend its Schedule 13D “promptly” (an undefined term) following a material change in the facts set forth in the prior disclosure. The new rules require a Schedule 13D amendment within two business days after such a material change. (2)

Schedule 13G

The new filing deadlines affect all three types of investors that use Schedule 13G rather than Schedule 13D to report greater than 5 percent beneficial ownership of a covered class. These are “qualified institutional investors” (QIIs), “passive investors,” and “exempt investors.”

Qualified Institutional Investor (QII)

To be eligible to file on Schedule 13G as a QII, the investor must be an enumerated type of regulated institution. It also must certify that it has acquired the securities in question in the ordinary course of its business and not with the purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect (control purpose). (3)

Initial Filing

Historically, a QII has had two possible deadlines for its initial Schedule 13G. The general rule has been that the QII must file its initial Schedule 13G within 45 days after the end of the first calendar year during which the QII acquires more than 5 percent beneficial ownership (assuming the QII remained above 5 percent as of the last day of that calendar year). However, if the QII exceeded 10 percent beneficial ownership as of the last day of any calendar month during that first calendar year, it could not wait to make its initial filing until after the year-end. Instead, the QII had to file its initial Schedule 13G within 10 days after that month-end.

The rule amendments retain these same 5 percent- and 10 percent-based initial filing possibilities, but shorten the deadline associated with each. The new general rule is that a QII must file its initial Schedule 13G within 45 days after the end of the first calendar quarter during which it acquires more than 5 percent beneficial ownership (assuming the QII remains above 5 percent as of the last day of that calendar quarter). (4) If the QII exceeds 10-percent beneficial ownership as of the last day of any calendar month during that first calendar quarter, it now must file its initial Schedule 13G within five business days after that month-end. (5)

Amended Filing

Under the historical rules, a QII that had an existing Schedule 13G on file was required to file an amendment within 45 days after the end of each calendar year if, as of the year-end, there had been any change in the information previously reported. In addition, if a QII exceeded 10-percent

beneficial ownership as of the last day of a calendar month, it had to amend its Schedule 13G within 10 days of that month-end; and thereafter, if the QII's beneficial ownership changed by more than 5 percent of the covered class as of the last day of any month, a further amendment was due within 10 days after that month-end.

The SEC has retained this general amendment framework but has tightened the associated filing deadlines. Now, a QII must file a Schedule 13G amendment within 45 days after the end of each calendar quarter if, as of the quarter-end, there has been any material change (no longer just "any change") in the information previously reported. (6)

In addition, if a QII exceeds 10-percent beneficial ownership as of the last day of a calendar month, it now must amend its Schedule 13G within five business days of that month-end. Thereafter, if the QII's beneficial ownership changes by more than 5 percent of the covered class as of the last day of any month, a further Schedule 13G amendment is due within five business days after that month-end. (8)

Passive Investor

To file on Schedule 13G as a passive investor, the investor must not be reporting as a QII and must have less than 20-percent beneficial ownership of the covered class. A passive investor also must certify that it has not acquired the securities with a control purpose. (9)

Initial Filing

A passive investor traditionally has had to file its initial Schedule 13G within 10 days after acquiring more than 5 percent beneficial ownership of a covered class. The rule amendments have shortened the initial filing deadline to five business days. (10)

Amended Filing

Until now, a passive investor that had an existing Schedule 13G on file was required to file an amendment within 45 days after the end of each calendar year if, as of the year-end, there had been any change in the information previously reported. In addition, a passive investor was required to amend its Schedule 13G promptly upon acquiring more than 10 percent beneficial ownership and, thereafter, promptly upon increasing or decreasing its beneficial ownership by more than 5 percent of the covered class.

Here too the SEC has introduced new filing deadlines while preserving the existing amendment framework. Now, a passive investor must amend its existing Schedule 13G within 45 days after the end of each calendar quarter if, as of the quarter-end, there has been any material change in the information previously reported. (11)

In addition, if a passive investor exceeds 10 percent beneficial ownership, it must amend its Schedule 13G within two business days. (12) Thereafter, if the passive investor's beneficial ownership changes by more than 5 percent of the covered class, the passive investor must file a further Schedule 13G amendment within two business days. (13)

Exempt Investor

An exempt investor is one that has surpassed 5 percent beneficial ownership of a covered class other than by means of an “acquisition.” (An example is a pre-IPO investor whose position becomes an investment in a covered class due to the company registering the class under Section 12 of the Exchange Act in connection with the IPO.) An exempt investor – unlike a QII or a passive investor – is affirmatively required to use Schedule 13G to report its greater than 5 percent beneficial ownership.

(14)

Initial Filing

An exempt investor historically has been required to file its initial Schedule 13G within 45 days after the end of the calendar year in which it exceeded 5 percent beneficial ownership of the covered class (assuming the exempt investor remained above 5 percent as of the last day of that calendar year).

Under the new rules, an exempt investor must file its initial Schedule 13G within 45 days after the end of the calendar quarter during which it exceeds more than 5 percent beneficial ownership (assuming the exempt investor remains above 5 percent as of the last day of that calendar quarter). (15)

Amended Filing

Under the prior rules, an exempt investor was required to file a Schedule 13G amendment within 45 days after the end of the calendar year if, as of the year-end, there had been any change in the information previously reported.

Now, the exempt investor must file a Schedule 13G amendment within 45 days of the end of the calendar quarter if, as of the quarter-end, there has been any material change in the information previously reported. (16)

Extended Filing Cut-Off Time

In recognition of the practical challenges associated with the shortened filing deadlines, the rule amendments have extended the daily EDGAR cut-off time for Schedule 13D and 13G filings. The new cut-off is 10 p.m. ET, compared to the previous 5:30 p.m. ET deadline.

Structured Data Requirement

The rule amendments require that Schedule 13D and Schedule 13G filings be made in a structured, machine-readable data language. This means the HTML or ASCII format currently required for such filings will be replaced by an XML language specific to Schedules 13D and 13G. The adopting release says the SEC intends to develop a web-based reporting application for this purpose. Materials attached as exhibits to Schedules 13D and 13G will not be subject to the structured data requirement.

Cash-Settled Equity Derivative Securities

The adopting release sets forth guidance, rather than adopting proposed new rules, on situations in which a cash-settled equity derivative may result in beneficial ownership of the reference shares. The adopting release also amends Item 6 of Schedule 13D concerning disclosure of cash-settled equity derivatives.

Guidance on When Holding a Cash-Settled Equity Derivative Security Results in Beneficial Ownership of Reference Shares

Neither the Exchange Act nor the rules thereunder define the term “beneficial owner,” but Rule 13d-3 does provide standards for determining whether a person has that status. At the core of Rule 13d-3 is the concept that a person beneficially owns securities if the person has, or in some cases has the right to acquire, “voting power” (the right to vote or cause the voting of the securities) or “investment power” (the right to dispose or cause the disposition of the securities).

The terms of a typical cash-settled equity derivative security only provide the holder with economic exposure to the issuer shares notionally tied to the instrument (reference shares). That is, the instrument typically does not actually vest its holder with voting power or investment power over the reference shares, as a result of which the holder typically is not seen to beneficially own the reference shares.

Over the years, however, various observers have raised concerns about the ability of holders of cash-settled equity derivative securities to influence control of an issuer by, for example, pressuring the counterparty to the derivative transaction to make certain decisions regarding the voting or disposition of reference shares that the counterparty may have acquired for hedging purposes.

The SEC proposed new Rule 13d-3(e) to address those and related concerns. Rule 13d-3(e) would have deemed the long party to a cash-settled equity derivative security (other than a security-based swap) to be the beneficial owner of the relevant reference shares if the long party held the derivative security with a control purpose. (17)

The SEC has not adopted the proposed rule. Instead, the adopting release effectively reaffirms the applicability of existing Rule 13d-3 to determine whether holding a cash-settled equity derivative security gives rise to beneficial ownership of reference shares, and provides guidance on applying existing Rule 13d-3 for purposes of that analysis. (18)

The guidance states that a holder of a cash-settled equity derivative security (other than a security-based swap) may be deemed to have beneficial ownership of reference shares if:

- the cash-settled equity derivative provides its holder, directly or indirectly, with exclusive or shared voting or investment power over reference securities of the covered class through a contractual term of the derivative security or otherwise (this guidance corresponds to existing Rule 13d-3(a));
- 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 reporting requirements of Section 13(d) or 13(g) (this guidance corresponds to existing Rule 13d-3(b)); or

- the holder of the cash-settled equity derivative (i) has a right to acquire beneficial ownership of the reference security within 60 days or (ii) acquires the right to acquire beneficial ownership of the reference security with control purpose, regardless of when the right is exercisable (this guidance corresponds to existing Rule 13d-3(d)(1)).

Amendment to Item 6 of Schedule 13D

Item 6 of Schedule 13D calls for a description of any contracts, arrangements, understandings, or relationships between the reporting person and any other party “with respect to any securities of the issuer.” In the proposing release, the SEC expressed concern that the quoted language might be read – incorrectly – to suggest that no disclosure is required in the case of contracts, etc. “that only create economic exposure to the issuer’s securities or are otherwise considered synthetic.”

The adopting release removes any ambiguity on this point by amending the text of Item 6 of Schedule 13D. As revised, Item 6 requires the reporting person to describe any contracts, arrangements, understandings, or relationships with any other party “with respect to any securities of the issuer, including any class of such issuer’s securities used as a reference security,” in connection with, among other things, any “security-based swaps or any other derivative securities.” This means Item 6 disclosure expressly covers security-based swaps and other equity derivatives settled exclusively in cash. The adopting release further advises that a derivative security need not have originated with the issuer, or otherwise be part of the issuer’s capital structure, in order for an Item 6 disclosure obligation to arise.

Group Formation

Under Sections 13(d)(3) and 13(g)(3) of the Exchange Act, when two or more persons “act as a group for the purpose of acquiring, holding, or disposing of securities of an issuer,” that group is deemed a “person” for purposes of Section 13. If the members of the group have aggregate beneficial ownership of more than 5 percent of a covered class, the group has a Schedule 13D or 13G reporting obligation.

The SEC had proposed extensive amendments to the rules concerning group formation. The SEC has not implemented the most dramatic of those contemplated changes. Instead, the bulk of the adopting release’s discussion of group issues consists of SEC guidance concerning when a group comes into existence (or not).

Background on the SEC’s Proposed Amendments to Group-Formation Rules

Traditionally, many investors (and many courts) have taken it as given that in order for multiple investors to form a Section 13 group, they first must reach an explicit or implicit “agreement” to do so. This understanding has centered on Rule 13d-5(b)(1), which states that “[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, the group formed thereby shall be deemed to have acquired beneficial

ownership ..., as of the date of such **agreement**, of all equity securities of that issuer beneficially owned by any such persons.” (Emphasis added.) The Rule 13d-5(b)(1) reference to an agreement is not contained in the parent statutory language of Sections 13(d)(3) and (g)(3).

The SEC’s proposing release would have amended Rule 13d-5(b) to remove its references to “agreement,” in order to align the rule with the statute and thereby eliminate any implication that an agreement in fact is a prerequisite of group formation. (19) This proposal generated sharp criticism from some quarters, on the basis that it would introduce uncertainty by upsetting a traditional understanding of group formation, and risked chilling investor communications with fellow investors, issuers, or other parties.

SEC Determination That Statutory Language Speaks for Itself

As stated in the adopting release, the SEC concluded that the proposed amendment to Rule 13d-5(b)(1) was not necessary, simply because Sections 13(d)(3) and (g)(3) – with their bare “**act as** a group” language – do express the applicable legal standard. (Emphasis added.)

The adopting release states that under this standard, a determination as to whether a group has been formed “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 adopting continues by affirming the SEC’s recognition that “to determine that a group has been formed ..., the evidence must show, 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.” The adopting release adds that two or more persons taking “similar actions” is not conclusive, in and of itself, that a group has been formed.

Guidance on When Shareholder Engagement Does Not Create a Group

Having made that fundamental point, the adopting release goes on to provide guidance on a variety of situations in which the SEC would not view a group to be formed. This guidance appears responsive to commenter concerns that the Rule 13d-5(b)(1) proposal evidenced an SEC view of group formation that could be understood as discouraging shareholder engagement with issuers or communication among shareholders. The guidance states that the SEC would not consider a Section 13 group to be formed where:

- two or more shareholders communicate with each other regarding an issuer (including discussions that relate to improvement of the long-term performance of the issuer, changes in issuer 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) without taking any other actions;
- two or more shareholders engage in discussions with an issuer’s management, without taking any other actions;

- shareholders jointly make recommendations to an 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 if the issuer does not take steps to implement the shareholders' recommended actions;
- shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Rule 14a-8 under the Exchange Act for presentation at a meeting of shareholders;
- a shareholder has a conversation, email exchange, phone contact, or meetings with an activist investor that is seeking support for proposals the activist is making to an issuer's board or management, without more (e.g., without the shareholder consenting or committing to a course of action); or
- a shareholder makes an announcement or other communication stating the shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees, without more.

We consider the foregoing SEC guidance to be generally consistent with market participants' current understanding

Guidance on Tipper-Tippee Relationships Giving Rise to Group Status

In the proposing release, the SEC voiced concern with the phenomenon of an activist investor acquiring more than 5 percent beneficial ownership of a covered class and then, prior to publicly disclosing that fact in its Schedule 13D, alerting fellow market participants about its acquisition. One potential result of such pre-filing communication is that the "tippee" may be able to purchase issuer shares at a comparatively advantageous price prior to any increase in the share price occasioned by the lead activist's eventual Schedule 13D filing.

The SEC proposed to address this phenomenon by adding a new provision to Rule 13d-5(b)(1). It would have deemed a Section 13 group to be formed if an acquiring investor shared nonpublic information about its upcoming Schedule 13D filing with another market participant with the purpose of inducing the information recipient to purchase shares of the issuer, and the information recipient in fact made such a purchase. The group would have been deemed formed when the tippee first made a purchase based on the shared information.

The SEC has not adopted that proposed amendment. Instead it has concluded that Section 13(d)(3) of the Exchange Act provides an adequate standard for determining whether and when tipper-tippee behavior results in group formation. The adopting release does, however, provide guidance on that topic, stating that the type of behavior described above could well result in the tipper and the purchasing tippee being seen to constitute a group.

The guidance concludes that a final determination as to whether a group is formed will depend upon the facts and circumstances, including (i)

whether the purpose of the original acquiror's communication with another market participant was to cause it to purchase the securities and (ii) whether the market participant's purchases were made as a direct result of the information shared by the original acquiror. (20)

Additional Acquisitions by Group Member; Intra-Group Transfers

The rule amendments add new Rules 13d-5(b)(1)(ii) and (b)(2)(i), as redesignated and slightly modified from what had been proposed. These provisions make clear that in the case of an existing Section 13 group, any post-formation acquisition of securities by a group member will be attributed to the group once the collective beneficial ownership of the group members has exceed 5 percent of the covered class.

The rule amendments also add new Rules 13d-5(b)(1)(iii) and (b)(2)(ii), similarly as redesignated and slightly modified. These rules provide that an existing Section 13 group will not be deemed to have acquired beneficial ownership of additional securities of a covered class if a member of the group becomes a beneficial owner of the securities through a sale or transfer from another member of the same group.

Compliance Deadlines

The amended rules will become effective 90 days after the adopting release has been published in the Federal Register. Notwithstanding that fact, compliance with the new Schedule 13G deadlines and the new structured data requirement is subject to the following transition periods.

Schedule 13G Deadlines

The amended deadlines for Schedule 13G initial filings and amendments will take effect on Sept. 30, 2024. (21) Beneficial owners reporting on Schedule 13G must continue to comply with the traditional deadlines through Sept. 29, 2024; and must comply with the new deadlines starting on Sept. 30, 2024.

The amended deadlines for Schedule 13D initial filings and amendments are not subject to delayed compliance. That is, they will take effect 90 days after publication of the adopting release in the Federal Register.

Structured Data

Compliance with the new structured data requirement for Schedules 13D and 13G is not required until Dec. 18, 2024. Those filers who wish to comply voluntarily in advance of that date may begin doing so on Dec. 18, 2023.

Takeaways

- **The adopting release does not introduce all of the changes contemplated by the SEC's initial proposal.** Some of the newly adopted filing deadlines are not as short as originally proposed. The SEC refrained entirely from adopting other proposed rules in the areas of group formation and beneficial ownership of shares

underlying cash-settled equity derivatives.

- **The new filing deadlines present a significant challenge and will require practical attention.** Investors who regularly file Schedules 13D and 13G – and perhaps just as importantly, investors who file them only occasionally – will need to assess their internal policies and procedures to ensure they are in a position to prepare accurate filings under the newly compressed timeframes. For example, the traditional January/February project of considering which existing Schedules 13G require amending has now become a quarterly endeavor.
- **The SEC will be monitoring compliance with the new deadlines.** Investors should expect sustained SEC focus on compliance with the new Schedule 13D and 13G filing deadlines. It is perhaps not coincidental that the SEC announced a series of settled enforcement actions concerning Section 13 filing compliance shortly before issuing the adopting release.
- **The market's current understanding regarding cash-settled equity derivatives has not been disrupted.** The SEC has avoided introducing potentially difficult-to-interpret new rules concerning when a holder of a cash-settled equity derivative may be deemed to beneficially own reference shares, instead opting to reaffirm existing legal standards and prior guidance. Most practitioners should find this approach consistent with how they have customarily approached the issue.
- **Analyzing “group” issues will remain the same challenge it has always been.** The SEC's guidance on group formation, offered in lieu of rule changes, is generally welcome and appears to represent the SEC's recognition that market participants were worried about the chilling signals sent by the 2022 proposals. Nonetheless, the guidance does not greatly ease the customary (and unavoidable) challenge of assessing exactly when and under what circumstances a group has been formed.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Scott Budlong at 646-746-2036 or sbudlong@btlaw.com.

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(1) Rule 13d-1(a) relates to the filing of an initial Schedule 13D due to acquiring more than 5 percent beneficial ownership of a covered class. Rules 13d-1(e), (f), and (g) relate to the filing of an initial Schedule 13D by an investor that to date has been reporting its position on Schedule 13G but now has lost its Schedule 13G eligibility.

(2) Rule 13d-2(a). In practice, many Schedule 13D filers had already interpreted the prior “prompt” amendment standard as meaning two business days in most circumstances.

(3) See Rule 13d-1(b).

(4) Rule 13d-1(b)(2).

(5) *Id.*

(6) Rule 13d-2(b). The adopting release states that for purposes of assessing whether a “material change” has occurred as of the end of any quarter in the information previously reported on Schedule 13G – thus triggering a Schedule 13G amendment under Rule 13d-2(b) – the Schedule 13G filer should look to Rule 13d-2(a). That rule provides guidance on whether a Schedule 13D amendment has been triggered by the occurrence of a material change in the previously reported information. Specifically, Rule 13d-2(a) states that an acquisition or disposition of one percent or more of the covered class is deemed to be a material change, and that an acquisition or disposition of less than that amount may be material, depending on facts and circumstances. (One notes that while Rule 13d-2(b) has been revised to replace the former “any change” formulation with “any material change,” the proviso to Rule 13d-2(b) remains intact. That proviso states that a Schedule 13G amendment “need not be filed with respect to a change in the percent of the class outstanding previously reported if the change results solely from a change in the aggregate number of securities outstanding.”)

(7) Rule 13d-2(c).

(8) *Id.*

(9) See Rule 13d-1(c).

(10) Rule 13d-1(c).

(11) Rule 13d-2(b).

(12) Rule 13d-2(d).

(13) *Id.*

(14) See Rule 13d-1(d).

(15) Rule 13d-1(d).

(16) Rule 13d-2(b).

(17) Security-based swaps were excluded from the proposed rule’s purview because they were (and remain) subject to a separate SEC rulemaking initiative, proposed Rule 10B-1.

(18) The guidance echoes the SEC’s 2011 explanation of scenarios in which a security-based swap may result in beneficial ownership pursuant to the application of existing Rule 13d-3. See SEC Release No.

(19) Specifically, Rule 13d-5(b)(1) would have been amended to state:
“When two or more persons act as a group under [Section 13(d)(e) or (g)(3)] of the Act, the group shall be deemed to have acquired beneficial ownership, for purposes of [Section 13(d) or 13(g)] of the Act, of all equity securities of that an issuer beneficially owned by any such persons as of the date of the group’s formation.”

(20) In order for the tipper and the tippee to constitute a group in these circumstances, the tippee in fact would have had to make a purchase; it is not the mere sharing of information that causes the group to form.

(21) This means, among other things, that an assessment of whether there have been changes in a Schedule 13G filer’s previously reported information (such that an amendment is required) will be done, as normal, as of Dec. 31, 2023. Therefore if, as of Dec. 31, 2023, there has been any change in the previously reported information, the investor will have a Schedule 13G amendment due by Feb. 14, 2024. That, however, is the last time the has-there-been-a-change analysis will be performed on a year-end basis. The switch to making the assessment on a quarterly basis (with the standard now being a “material change”) occurs on Sept. 30, 2024. Thus, for example, if a Schedule 13G filer has any material changes in its previously reported information as of Sept. 30, 2024, an amended Schedule 13G will be due by Nov. 14, 2024.