

SEC amends Schedule 13D and 13G beneficial ownership reporting requirements

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On October 10, 2023, the U.S. Securities and Exchange Commission (SEC) adopted final rules¹ to amend beneficial ownership² reporting requirements under the U.S. Securities Exchange Act (Exchange Act) to, among other things, shorten the deadlines for Schedule 13D and 13G filings.

Similar to the early warning reporting and alternative monthly reporting filings required to be made under Canadian securities laws, Schedule 13D and 13G filings provide transparency to the market that an investor, or a group of investors, has accumulated or holds a significant stake in the voting equity securities of any domestic or foreign issuer that has securities listed on a U.S. national securities exchange or otherwise has a class of equity securities registered under Section 12 of the Exchange Act³ (a U.S. reporting company).

What you need to know

- The SEC has significantly shortened the Schedule 13D and Schedule 13G filing deadlines. For example, the initial Schedule 13D, and the initial Schedule 13G for passive investors⁴, will be due **5 business days** (versus 10 calendar days) after crossing the 5% threshold. Initial Schedule 13G filings for Qualified Institutional Investors (QIIs)⁵ and exempt investors⁶ will also be accelerated from the current rules, as described in more detail below.
- The SEC has also made changes to its deadlines for Schedule 13D and 13G amendments. For example, Schedule 13D amendments, and Schedule 13G amendments for passive investors exceeding the 10% threshold, will be due within **2 business days** of the triggering event (versus “promptly” under the current rules). The deadlines for amendments have also been shortened for QIIs and exempt investors, as described in more detail below.
- Investors in companies that are both Canadian reporting issuers and U.S. reporting companies, including Canadian companies relying on the multijurisdictional disclosure system (MJDS), need to be mindful of the reporting thresholds, deadlines and other requirements under both the Canadian and U.S. regimes. We have included a chart comparing the U.S. and Canadian filing deadlines at the end of this bulletin.
- In addition to the shortened deadlines, the SEC clarified disclosure requirements regarding holders of certain cash-settled derivatives to remove any implication that a securityholder is not required to disclose their interest in cash-settled derivatives.

- The SEC also provided clarifying guidance on the circumstances where a “group” may be found to have been formed and become subject to Section 13 reporting obligations.

Background

Schedule 13D is the U.S. equivalent of a Canadian early warning report. An initial Schedule 13D report must be filed following the acquisition of beneficial ownership of more than 5% of a class of a U.S. reporting company’s voting equity securities by a person or group (a purchaser) that has or is deemed to have “control intent” in respect of the issuer.

Schedule 13G is a short-form filing that may be used in lieu of Schedule 13D by QIIs, passive investors and exempt investors with no “control intent” (in the case of QIIs and passive investors) to report ordinary course beneficial ownership of more than 5% of a U.S. reporting company’s voting equity securities. Schedule 13G is the U.S. equivalent of the Canadian alternative monthly report that certain “eligible institutional investors” may be permitted to file instead of an early warning report.

Schedule 13D must be amended to report any material changes in the information reported, such as an increase or decrease in the purchaser’s holdings of 1% or more of the issuer’s outstanding voting equity securities. Schedule 13G must also be amended to report changes in beneficial ownership each year, or more frequently upon QIIs and passive investors crossing the 10% threshold, or to report an increase or decrease of 5% beneficial ownership.

Filing deadlines to be shortened

The SEC’s final rules accelerate many of the initial filing deadlines for Schedule 13D and Schedule 13G, as follows:

- For Schedule 13D filers, the initial filing deadline is shortened to **5 business days** (versus 10 calendar days under the existing rules) after crossing the 5% beneficial ownership reporting threshold.
- For passive investors, the initial Schedule 13G filing deadline is likewise shortened to **5 business days** (versus 10 calendar days under the existing rules) after crossing the 5% beneficial ownership threshold¹.
- For QIIs with beneficial ownership exceeding 10%, the initial Schedule 13G (or an amendment to their existing Schedule 13G, if previously over 5%) will be due within **5 business days** after month-end in which the 10% threshold was crossed and thereafter upon a 5% increase or decrease in beneficial ownership (versus within 10 calendar days after month-end under the current rules).
- For QIIs with beneficial ownership of 5% or more, but not more than 10%, and for exempt investors that cross the 5% threshold, the filing deadline for their initial Schedule 13G is accelerated to **45 calendar days after quarter-end** (versus 45 calendar days after year-end) in which the 5% threshold is crossed.

Under the new rules, the deadlines for amendments to a previously filed Schedule 13D and 13G filing have also been changed:

- Schedule 13D amendments must be filed within **2 business days** (versus the current requirement to file “promptly”, a term that has been open to interpretation by market participants)².
- Passive investors will be required to file an amendment to their existing Schedule 13G within **2 business days** of crossing the 10% threshold and thereafter upon a 5% increase or decrease in beneficial ownership (versus “promptly” under the current rules).
- QIIs will be required to file an amendment to their existing Schedule 13G, if previously over 5%, within **5 business days after the end of the month** in which the 10% threshold is crossed or a 5% increase or decrease in beneficial ownership occurred (versus 10 calendar days after month-end under the current rules).

- The filing deadline for all other Schedule 13G amendments has been accelerated to **45 calendar days after quarter-end** (versus 45 calendar days after year-end under the existing rules).
- The new SEC rules have also limited Schedule 13G amendments to only report “material” changes (deemed to include an increase or decrease of beneficial ownership of 1% or more), which aligns with the standard for amendments by Schedule 13D filers (versus the requirement under the existing rules to report “any” change).

The SEC’s final rules also extend the filing cut-off times for Schedule 13D and Schedule 13G from 5:30 p.m. to 10:00 p.m. Eastern time.

In addition, to make it easier for investors and markets to use the information disclosed on Schedule 13D and Schedule 13G, the SEC’s final rules require these filings to use a structured, machine-readable, XML-based language (also known as XBRL). This requirement applies to all information disclosed on Schedule 13D and Schedule 13G, other than exhibits.

Treatment of cash-settled derivatives

Cash-settled equity derivatives generally are not included in the calculation of “beneficial ownership” for Section 13 reporting purposes because such securities do not give the holder thereof the “right to acquire” any voting equity securities of a U.S. reporting company. While the SEC did not adopt any rule changes that would have deemed certain holders of cash-settled derivative securities as beneficial owners for Section 13 reporting purposes, the SEC has instead revised Item 6 of Schedule 13D to require the disclosure of interests in cash-settled derivatives.

Under the current rules, Item 6 of Schedule 13D requires disclosure of “any contracts, arrangements, understandings, or relationships (legal or otherwise) ... with respect to any securities of the issuer ...” Under the new rules, Item 6 will now expressly require disclosure of any contracts, arrangements, understandings or relationships with respect to any class of a U.S. reporting company’s voting equity securities used as a reference security in connection with any call options, put options, security-based swaps or any other derivative securities.

In the adopting release for the new Section 13 rules, the SEC indicated that it wanted to dispel any implication that “with respect to securities of the issuer” could be read to suggest that contracts, arrangements, understandings or relationships that only create economic exposure to a U.S. reporting company’s voting equity securities or are otherwise synthetic did not need to be disclosed under Item 6 or that the derivative security had to have originated with the U.S. reporting company or otherwise be part of its capital structure in order to be disclosable under that item.

Group beneficial ownership reporting

Sections 13(d)(3) and (g)(3) of the Exchange Act provide that, when two or more persons act as a group “for the purpose of acquiring, holding or disposing of securities of an issuer”, the group is treated as a single person for purposes of calculating beneficial ownership of the relevant securities. Among other things, this means that the group members’ holdings and transactions in the issuer’s securities are aggregated for purposes of determining when and how the reporting thresholds apply. There is no definition of “group” in the SEC rules, and the determination of whether coordinated efforts among two or more persons constitute a group subject to regulation as a single person is a question of fact that, historically, has been resolved through case law.

In the adopting release, the SEC has provided extensive guidance on the application of the current rules on group formation. The guidance provides a range of examples on activities between shareholders that **would not** constitute the formation of a group. These examples include:

- shareholders communicating with each other regarding an issuer without taking any action;
- two or more shareholders engaging in discussions with an issuer’s management without taking any other action;

- shareholders jointly making recommendations to an issuer regarding the issuer’s board of directors where no discussion of individual directors or board expansion occurs and no commitments are made, or agreements or understandings are reached, among the shareholders;
- shareholders jointly submitting a non-binding shareholder proposal to an issuer;
- a conversation, email, phone contact or meeting between a shareholder and an activist investor that is seeking support for its proposals to an issuer’s board or management, without further action; and
- an announcement or a communication by a shareholder of the shareholder’s intention to vote in favor of an unaffiliated activist investor’s director nominees, without further action.

However, the SEC guidance has identified one scenario where a “group” would be deemed to be formed. If a shareholder who is (or would be) required to file on Schedule 13D intentionally communicates to a person that such a filing will be made, with the intention of causing that person to make purchases of the same security—and that person, as a result of that communication, makes purchases of the suggested security—this would result in a group being formed.

In addition to the above guidance, the SEC has also adopted new rules regarding group reporting that will attribute acquisitions of additional equity securities by group members to the group at any time after the group has been formed.

Effectiveness date

The amendments will become effective 90 days after publication of the adopting release in the Federal Register. Compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024. Compliance with the machine-readable, XML requirements will be required beginning on December 18, 2024.

Comparison of U.S. and Canadian beneficial ownership reporting requirements

U.S. Schedule 13D versus Canadian Early Warning Reporting System (EWRS)

Current SEC Rule	2023 SEC Final Rule	Canadian Rule
Initial Filing Deadline		

<p>Within 10 calendar days after acquiring beneficial ownership of greater than 5% or losing eligibility to file on Schedule 13G.</p>	<p>Within 5 business days after acquiring beneficial ownership of greater than 5% or losing eligibility to file on Schedule 13G.</p>	<p>After acquiring beneficial ownership of, or control or direction over, 10% or more of a class of voting or equity securities, becoming disqualified from filing or electing to no longer file under the alternative monthly reporting system (AMRS) (see Schedule B below):</p> <ul style="list-style-type: none"> • issue a news release promptly (but no later than the opening of trading on the next business day); and • file an early warning report (EWR) promptly (but no later than 2 business days).
<p>Amendment Triggering Event</p>		
<p>“Material” change in facts set out in previous Schedule 13D. A beneficial ownership increase or decrease of 1% or more is deemed to be “material”⁹.</p>	<p>No change proposed.</p>	<p>Acquisition or disposition of beneficial ownership, or acquisition or disposition of control or direction over:</p> <ul style="list-style-type: none"> • securities equal to 2% or more of the class that was the subject of acquiror’s most recent report¹⁰; or • securities convertible into 2% or more of the outstanding securities referred to above¹¹. <p>Change in a material fact in acquiror’s most recent report.</p> <p>Beneficial ownership, or control or direction over, outstanding securities of class that was the subject of acquiror’s most recent report drops below 10%¹².</p>
<p>Amendment Filing Deadline</p>		
<p>Promptly after the triggering event. (See Rule 13d-2(a)).</p>	<p>Within 2 business days after the triggering event.</p>	<p>Issue a news release promptly (but no later than the opening of trading on the next business day) and file an early warning report (EWR) promptly (but no later than 2 business days).</p>

U.S. Schedule 13G for Qualified Institutional Investors (QIIs), Passive Investors and Exempt Investors versus Canadian Alternative Monthly Reporting System (AMRS) for Eligible Institutional Investors (EIs)

Current SEC Rule	2023 SEC Final Rule	Canadian Rule
Initial Filing Deadline		
<p>QIIs and exempt investors: Within 45 calendar days after the calendar year-end in which beneficial ownership is greater than 5%, except for QIIs who initially cross the 10% threshold, who would be required to make their initial 13G filing 10 calendar days after the month-end in which the 10% threshold is crossed.</p> <p>Passive investors: Within 10 calendar days after acquiring beneficial ownership of greater than 5%.</p>	<p>QIIs and exempt investors: 45 calendar days after the calendar quarter-end in which beneficial ownership is greater than 5%, except for QIIs who initially cross the 10% threshold, who would be required to make their initial 13G filing 5 business days after the month-end in which the 10% threshold is crossed.</p> <p>Passive investors: Within 5 business days after acquiring beneficial ownership of greater than 5%.</p>	<p>Non-disqualified EII: Within 10 days following the month-end in which:</p> <ul style="list-style-type: none"> the EII elects to file reports under AMRS, if its security holding % of a class of voting or equity securities is 10% or more; or the EII's security holding % of a class of voting or equity securities increased to 10% or more.
Amendment Triggering Event		
<p>All Schedule 13G filers: Any change in the information previously reported on Schedule 13G (other than a change in ownership percentage solely due to change in shares outstanding)¹³.</p> <p>QIIs and passive investors: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.</p>	<p>All Schedule 13G filers: Material change in the information previously reported on Schedule 13G (other than a change in ownership percentage solely due to change in shares outstanding)¹⁴. In alignment with the 13D definition of “material”, a beneficial ownership increase or decrease of 1% or more is deemed to be “material”.</p> <p>QIIs and passive investors: Same as the current Schedule 13G.</p>	<p>Non-disqualified EII: Security holding % in a class of voting or equity securities, as at the month-end:</p> <ul style="list-style-type: none"> increased or decreased by 2.5% of the outstanding securities of the relevant class that is greater than 10%; or decreased to less than 10% <p>Change in a material fact in the EII's most recent report filed under the AMRS.</p>
Amendment Filing Deadline		
<p>All Schedule 13G filers: 45 calendar days after the calendar-year end in which any change occurred.</p> <p>QIIs: 10 calendar days after the month-end in which beneficial ownership exceeded 10% or there was, as of the month-end, a 5% increase or decrease in beneficial ownership.</p> <p>Passive investors: Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.</p>	<p>All Schedule 13G filers: 45 calendar days after the calendar-quarter end in which a material change occurred.</p> <p>QIIs: 5 business days after the month-end in which beneficial ownership exceeded 10% or there was, as of the month-end, a 5% increase or decrease in beneficial ownership.</p> <p>Passive investors: 2 business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.</p>	<p>Within 10 days after month-end.</p>

FOOTNOTES 

¹ SEC, Modernization of Beneficial Ownership Reporting (Release Nos. 33-11253; 34-98704; File No. S7-06-22) (Oct. 10, 2023).

- [2.](#) Under Rule 13d-3(a), “beneficial ownership” means that a security holder “directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares (1) voting power which includes the power to vote, or to direct the voting of, such security; and/or (2) investment power which includes the power to dispose, or to direct the disposition of, such security”. In addition, Rule 13d-3(d) provides that “beneficial ownership” also includes the “right to acquire” beneficial ownership within 60 days, including upon exercise of options, warrants and similar rights.
- [3.](#) This would include all NYSE and Nasdaq-listed companies, as well as certain other companies that are required to register under Section 12(g) of the Exchange Act because they have more than a prescribed number of shareholders.
- [4.](#) A “passive investor” is a beneficial owner of more than 5% but less than 20% of a covered class of a security who has not acquired and does not hold the subject securities 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.
- [5.](#) A “Qualified Institutional Investor” or “QII” that is qualified to report on Schedule 13G in reliance of Rule 13d-1(b) is an institution of a type enumerated in Rule 13d-1(b) (such as a broker-dealer, a bank, an insurance company, a registered investment company or investment advisor, and an employee benefit plan or a pension fund) that has acquired securities in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect.
- [6.](#) An “exempt investor” is a person who beneficially owns more than 5% of a covered class but has not made an acquisition of beneficial ownership subject to Section 13(d) (e.g., significant shareholders prior to the U.S. reporting company going public in the United States).
- [7.](#) In Canada, a passive “eligible institutional investor” may file an alternative monthly report (instead of an early warning report) with securities regulators within 10 calendar days after the month in which its beneficial ownership of (or control or direction over) a reporting issuer’s voting or equity securities represents 10% or more of the relevant class of securities at month-end. In the context of a formal takeover bid or substantial issuer bid, different requirements may apply.
- [8.](#) Under Canadian securities laws, a purchaser who acquires beneficial ownership of (or control or direction over) 10% or more of a class of voting or equity securities of a Canadian reporting issuer must promptly issue and file a press release and within 2 business days thereafter file an early warning report with securities regulators, unless the purchaser is eligible to file under the alternative monthly reporting system described in note 7 above. (The threshold drops to 5% if the reporting issuer is the subject of a formal takeover bid or issuer bid.) The purchaser is also prohibited from acquiring additional securities until one business day has passed since the early warning report was filed. This moratorium does not apply at the 20% ownership level or higher, at which point the takeover bid rules apply.
- [9.](#) Includes changes in beneficial ownership due to issuer actions (e.g., an increase or decrease in shares outstanding). See Question 103.08 [Sept. 14, 2009] of the SEC’s *Compliance and Disclosure Interpretations—Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting* (C&DI 103.08).
- [10.](#) If the increase or decrease in ownership, control or direction was solely a result of actions taken by the issuer, which actions have caused a change in the number of the issuer’s outstanding securities (e.g., treasury issuances or redemptions, retractions or other repurchases by the issuer affecting all securityholders), the acquiror would not be required to report this change.
- [11.](#) See note 10.
- [12.](#) See note 10.
- [13.](#) See C&DI 103.08.
- [14.](#) See C&DI 103.08.

To discuss these issues, please contact the author(s).

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