

New 13D/13G Rules Explained; Elon Musk Hypothetical; Section 16 Update

February 14, 2024

On October 10, 2023, the Securities and Exchange Commission (“SEC”) adopted amendments to the rules governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (the “Exchange Act”). The amendments (the “New Rules”) shorten the deadlines for initial and amended Schedule 13D and Schedule 13G filings and issue guidance regarding (1) cash-settled derivative securities and (2) group formations.

The New Rules became effective **February 5, 2024**. However, compliance with the revised Schedule 13G filing deadlines will not be required until **September 30, 2024**.

Holders of the securities of Foreign Private Issuers (“FPIs”) are subject to the same requirements for filings as apply to holders of securities of domestic companies, and are therefore subject to the same New Rules.

Both issuers and shareholders should familiarize themselves with the new deadlines and requirements.

Under the New Rules:

- **Shortened filing deadlines**

Investors filing a Schedule 13D and Schedule 13G are required to submit their filings within a shorter timeframe than previously required.

Under Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G, any person or group of persons owning or acquiring more than five percent of any covered class of equity securities is required to publicly file with the SEC either a Schedule 13D or 13G, depending on the nature of its ownership and the circumstances of its acquisition of securities. Generally, an investor with control intent files a Schedule 13D, while “Exempt Investors” (e.g., founder or pre IPO investor), investors without a control intent or “Passive Investors” and “Qualified Institutional Investors” file a Schedule 13G. The final amendments shorten the deadlines for making these filings.

For 13D Filers:

The **Initial filing** deadline was reduced from within 10 calendar days to **5 business days** after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G.

The timeline to file **Amendments** was changed from “promptly” to **within 2 business days**, when there is a material change from the facts set forth in the last Schedule 13D.

For Passive Investors filing 13G:

The **Initial filing** deadline was reduced from within 10 calendar days to **5 business days** after acquiring beneficial ownership of more than 5%.

The timeline to file **Amendments** was changed from 45 days after the **year** in which a change occurred to 45 days following the calendar **quarter**-end in which a **material** change from the set of facts set forth in the previous Schedule 13G occurred.

The timeline to file **Amendments** after beneficial ownership exceeds 10% or changes by more than 5% was changed from “promptly” to **within 2 business days**.

New Schedule 13G Requirements for Qualified Institutional Investors and Exempt Investors:

For both Qualified Institutional Investors and Exempt Investors, the **initial filing deadline** was changed from 45 calendar days after **year**-end to 45 calendar days after the calendar **quarter**-end in which the investor beneficially owns more than 5% of the covered class.

The timeline to file **Amendments** was changed from 45 days after the **year** in which there was a change from the set of facts set forth in the previous Schedule 13G to within 45 days following the calendar **quarter**-end in which a **material** change occurred.

For Qualified Institutional Investors, the initial filing deadline was reduced from 10 calendar days after month-end to within **5 business days after the month-end** in which beneficial ownership exceeds 10%.

For Qualified Institutional Investors, amendments must be filed within 5 business days after the month-end in which beneficial ownership exceeds 10% or changes by more than 5%.

To make these filings easier, the EDGAR cut-off times for Schedule 13D and Schedule 13G filings were extended from 5:30 p.m. to 10:00 p.m. Eastern Time.

- **Revised Item 6 of Schedule 13D**

Item 6 has been clarified to require disclosure of interests in all derivative securities, including cash-settled derivative securities, that use a covered class as a reference security.

- **XML-based language**

Schedule 13D and Schedule 13G filings will require submission using an XML-based language for quantitative disclosures, textual narratives and identification checkboxes. Voluntary compliance with the structured, machine-readable data amendments is permitted since December 18, 2023, but all relevant filers must comply beginning December 18, 2024.

- **Cash-settled Derivatives and Group Formation**

The SEC provided further guidance as to when cash-settled derivatives are counted toward the threshold for beneficial ownership, as well as to what constitutes formation of a group for the purposes of beneficial ownership.

The New Rules codify the SEC’s view that “the determination of whether two or more persons are acting as a group does not depend solely on the presence of an express agreement and 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.”

Hypothetical 1 – when Elon Musk acquired a stake in Twitter

On April 4, 2022, Elon Musk filed a 13G regarding Twitter with an event date of March 14, 2022 (acquisition of 9.2% of Twitter).

The same day, [the SEC sent him](#) a letter asking why his Schedule 13G filing did not appear to have been made within the required 10 days from the date of acquisition as required by Rule 13d-1(c), the rule upon which he represented that he had relied to make the submission.

Practical Effect if this Occurred Now

This rule has changed the compliance from 10 days to 5 business days after acquiring more than 5% beneficial ownership. This rule is not effective until **September 30, 2024** so Mr. Musk would still have had 10 days to comply.

However, the SEC also wrote to Mr. Musk that “with limited exception, a beneficial owner may not rely upon Rule 13d-1(c) to file a Schedule 13G in lieu of Schedule 13D if that person has acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer. See Rule 13d-1(c)(1) of Regulation 13D-G. Please provide us with a brief analysis of the bases upon which you determined that you were eligible to rely upon Rule 13d-1(c) to make the filing on Schedule 13G.”

If Mr. Musk was obliged to file a 13D instead of 13G and was not able to rely on the Passive Investor exemption, then the New Rules requiring a 5 days’ compliance would have been effective.

Hypothetical 2 – when Elon Musk amended his 13D

Following the SEC letter, Mr. Musk [converted](#) his 13G into a 13D filing. He then [amended it](#) on April 11, 2022 (with an event date of April 9, 2022, i.e., reporting that he informed Twitter that he was not joining the Board of Directors.)

Another amendment was [filed on April 14](#) related to an April 13 event (intention to acquire the company).

Practical Effect if this Occurred Now

Mr. Musk was required to file his amendment “promptly”. Under the new rules, the amendment would be required within 2 business days and April 11 was still within that timeframe from April 9. Same with April 14 and April 13.

If Mr. Musk was still filing 13Gs, his requirement to file an amendment would have been reduced from 45 days after the year in which such changes occurred (February 14, 2023) to 45 days following the calendar quarter-end (June 14, 2022).

Foreign Private Issuers and Section 16 Update

Shareholders of FPIs do not file Forms 3, 4 and 5 under Section 16. We have received questions regarding the status of the proposals to extend Section 16 compliance for shareholders of FPIs.

While the U.S. Senate version of the National Defense Authorization Act for Fiscal Year 2024 (NDAA) included a provision that would have eliminated the Forms 3,4 and 5 exemption under Section 16 for FPIs, this proposal has since been [scrapped](#). In the future, this could possibly become an issue again under a stand-alone Senate bill known as the [Holding Foreign Insiders Accountable Act](#) that could be enacted independently or find itself attached to another bill. We will continue to monitor any developments that may affect the Section 16 reporting obligations for securities of FPIs.

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