FREQUENTLY ASKED QUESTIONS ABOUT SECTION 13(D) AND SECTION 13(G) OF THE SECURITIES EXCHANGE ACT OF 1934

General

What is the general purpose of Section 13(d)?

In 1968, the Williams Act amended the Securities Exchange Act of 1934, as amended (the "Exchange Act"), enacting new provisions and rules related to tender offers. Specifically, Section 13(d) of the Exchange Act ("Section 13(d)") was "passed . . . in response to the growing use of cash tender offers as a means for achieving corporate takeovers."

Prior to the Williams Act, corporate raids through the use of exchange offers and proxy solicitations were regulated by Section 14(a) of the Exchange Act, as well as additional rules adopted by the Securities and Exchange Commission (the "SEC"). The Williams Act, and specifically Section 13(d), was enacted to overcome the gap in the securities laws and require disclosure when holders began "accumulating large blocks of equity securities of publicly held companies." Under Section 13(d), persons who, within a short period of time, have acquired large interests of equity securities, or increased the number of equity securities by a substantial amount, must disclose pertinent information related to their holdings in a particular company.

Consistent with the general purpose of the U.S. securities laws, Section 13(d) provides individual investors with greater transparency through informational disclosure. In many respects, Section 13(d) acts as an early warning, signaling "every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control."[1]

Why was Section 13(g) added to the Exchange Act as part of the Domestic and Foreign Investment Improved Disclosure Act of 1977?

Section 13(g) of the Exchange Act ("Section 13(g)"), requiring certain beneficial holders to file a Schedule 13G with the SEC, was added to the Exchange Act as part of the Domestic and Foreign Investment Improved Disclosure Act of 1977.[2]

Section 13(g) aims to mandate disclosure when certain investors accumulate large amounts of stock in a public

[1] *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22-25 (1977); *Mosinee Paper Corporation v. Rondeau*, 354 F. Supp. 686, 693-695 (W.D. Wis. 1973); *GAF Corporation v. Milstein*, 453 F. 2d 709, 711 (2d Cir. 1971); *Gearthart Industries v. Smith International, Inc.*, 741 F.2d 707, 713 (5th Cir. 1984); and *Rondeau v. Mosinee Paper Corporation*, 422 U.S. 49, 58 (1975).
[2] Pub. L. No. 95-214, § 203, 91. Stat. 1494.

company.[3] Section 13(g) requires "any person owning beneficially more than 5 percent of any class of a Section 13(d) security who is not currently required to report under Section 13(d) . . . to file with the [SEC] a short statement detailing relevant ownership information and to transmit such . . . statement to the issuer" (*see* "*What are the general requirements under Section 13(g)?*").[4]

Did the Dodd-Frank Wall Street Reform and Consumer Protection Act affect Section 13(d) and Section 13(g)?

Yes. Section 929R ("Section 929R") of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") amended Sections 13(d) and 13(g) by eliminating the requirement that a filer send copies of its Schedule 13D (or Schedule 13G, as applicable), and any amendments to its Schedule 13D (or Schedule 13G, as applicable), to the issuer and any exchange in which the securities beneficially owned are listed. Further, Section 929R provides the SEC with the authority to adopt rules to shorten the 10-day filing period for Schedule 13D and Schedule 13G filings.[5] Section 766 of the Dodd-Frank Act ("Section 766") also amended Section 13(d)(1) by providing the SEC with the authority to require beneficial ownership reporting of security-based swaps ("SBSs") (*see* "*Must a holder of more than 5% of derivative securities in an issuer make a filing on Schedule 13D or Schedule 13G?*").[6] The SEC has not yet altered its beneficial ownership reporting rules.[7]

What are the general requirements under Section 13(d)?

Under Section 13(d), any person who indirectly or directly becomes the beneficial owner of more than 5% of an issuer's equity securities registered under Section 12 of the Exchange Act or any equity security of an insurance company that is exempt from registration under Section 12(g)(2)(g) of the Exchange Act, must file with the SEC a Schedule 13D within 10 days after the acquisition.[8] The SEC's Division of Corporation Finance (the "Division" or "Staff") has maintained a strict interpretation of the 5% threshold. For example, the SEC noted in guidance that even where a broker erroneously purchases 5% of a covered equity security, the customer would nevertheless be required to file a Schedule 13D or Schedule 13G. A person does not have to have scienter to violate Section 13(d)'s provisions.[9]

Section 13(d) requires that the beneficial owner disclose to the SEC pertinent information on its security holdings for a particular issuer, including the background, identity, residence, and citizenship of, and the nature of the beneficial ownership by, the investor, the source and amount of the funds or other consideration used or to be used in making the purchases, the purpose of the transaction, the number of

[3] *See* S. Rep. 95-114, 1977 U.S.C.C.A.N. 4098, 4011.
[4] *Id.*
[5] *See* the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat 1376 (2010), § 929R.

[6] *See id.* at § 766.
[7] *See* SEC Chair Mary Jo White, "Remarks at the Transatlantic Corporate Governance Dialogue," Dec. 15, 2011, available at https://www.sec.gov/news/speech/2011/spch121511mls.htm.
[8] *See* Rule 13d-1.
[9] Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Compliance and Disclosure Interpretations ("C&DI"), Question 101.01-.06 (Jan. 3, 2014), available at https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm.

shares of the security which are beneficially owned, and information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer (*see "What information must be provided on a Schedule 13D?"*). However, Rule 13d-1 under the Exchange Act ("Rule 13d-1") provides the SEC with discretion to require additional information it deems necessary or appropriate in the public interest or for the protection of investors.[10]

Who is exempt from filing a Schedule 13D?

Under Section 13(d)(6) of the Exchange Act, beneficial owners will not need to file a Schedule 13D in the case of: (1) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933, as amended; (2) any acquisition of beneficial ownership of a security, which does not exceed 2% of the entire class of securities in a 12-month period; and (3) any acquisition of an equity security by the issuer of those securities.[11]

Additionally, Section 13(d)(6)(D) provides that the SEC may, through order or regulation, exempt any acquisition or proposed acquisition of a security from Section 13(d)'s reporting requirements.[12]

Is the U.S. Congress currently considering amendments to Sections 13(d) and 13(g)?

Yes. In March 2016, U.S. Senators Tammy Baldwin and Jeff Merkley introduced legislation (the "Brokaw Act")[13] that would amend Sections 13(d) and 13(g) for the purposes of enhancing transparency in the marketplace and strengthening oversight over activist hedge funds. The legislation was re-introduced in August 2017 by Senator Baldwin and Senator David Purdue. Most notably, the current version of the draft Brokaw Act would direct the SEC to:

- shorten the amount of time in which a Schedule 13D may be filed with the SEC (from 10 days to four business days);
- require any person that acquires "a direct or indirect short interest" in a class of equity securities (representing at least 5% of that class of securities) to file a Schedule 13D; and
- expand the definition of "beneficial ownership" to include persons holding "[a] pecuniary or indirect pecuniary interest" in at least 5% of a particular class of securities.

The Brokaw Act would also specify the methodology to be used for calculating beneficial ownership in the context of derivative instruments.[14]

What are the general requirements under Section 13(g)?

A person may generally file a short-form statement on Schedule 13G in lieu of a Schedule 13D if the person qualifies as either:

- a "qualified institutional investor" (under Rule 13d-1(b));
- a "passive investor" (under Rule 13d-1(c)); or
- an "exempt investor" (under Rule 13d-1(d)).

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[10] *See* Rule 13d-1.
[11] *See* § 13(d)(6) of the Exchange Act.
[12] *See id.* at § 13(d)(6)(D).
[13] The Brokaw Act is named for a Wisconsin town that went bankrupt after an out-of-state investor closed a paper mill in the town.
[14] *See* the Brokaw Act, S. 1744, 115th Cong. (2017), available at https://www.congress.gov/bill/115th-congress/senate-bill/1744/all-info.

A person that qualifies as a "qualified institutional investor" (*see* "*Who qualifies as an 'institutional investor' under Section 13 of the Exchange Act?*") will need to file a Schedule 13G within 45 days after the end of the calendar year (*i.e.*, February 14th) in which the person acquired beneficial ownership (*i.e.*, greater than 5% ownership of a class of equity securities).[15] A person who qualifies as a "passive investor" (*see* "*Who qualifies as a 'passive investor' under Section 13 of the Exchange Act?*") must file a Schedule 13G within 10 days after acquiring beneficial ownership (but not more than 20% of the class of equity securities.[16] A person who qualifies as an "exempt investor" (*see* "*Who qualifies as an 'exempt investor' under Section 13 of the Exchange Act?*") must file a Schedule 13G within 45 days after the end of the calendar year in which the person became a beneficial owner of a class of equity securities.[17] Generally, all persons, excluding those that rely on the "exempt investors" exemption, that file on a Schedule 13G must certify that they have acquired the subject securities with a passive investment purpose.[18]

Who qualifies as a "passive investor" under Section 13 of the Exchange Act?

A person may file a Schedule 13G in lieu of a Schedule 13D under the "passive investor" exemption, within 10 days of the triggering reporting event if the person: (1) has not acquired the securities with any purpose of, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to Rule 13d-3(b); (2) is not a qualified institutional investor; and (3) is not, either indirectly or directly, a beneficial owner of 20% or more of the security that is the subject of the Schedule 13G filing.[19]

Does the fact that a shareholder is disqualified from relying on the HSR Act exemption due to its efforts to influence management of the issuer on a particular topic, by itself, disqualify the shareholder from reporting beneficial ownership on Schedule 13G?

The Hart-Scott-Rodino Act (the "HSR Act") provides an exemption from the HSR Act's notification and waiting period provisions if, among other things, the acquisition of securities was made "solely for the purpose of investment," with the acquiror having "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." The inability to rely on the HSR Act exemption alone would not preclude a shareholder from filing on Schedule 13G. Instead, eligibility to use Schedule 13G will depend, among other things, on whether the shareholder acquired or is holding equity securities with the purpose or effect of changing or influencing control of the issuer. This determination is based upon all the relevant facts and circumstances.

The SEC has noted that the subject matter of the shareholder's discussions with the issuer's management may be dispositive in making this determination, although the context in which the discussions occur is also highly relevant. For example:

- Generally, engagement with an issuer's management on executive compensation and

[15] *See* Rule 13d-1(b)(2).
[16] *See* Rule 13d-1(c)(1)-(3).
[17] *See* Rule 13d-1(d).
[18] *See* Rule 13d-1(b)-(d).
[19] *See* Rule 13d-1(c).

social or public interest issues, without more, would not preclude a shareholder from filing on Schedule 13G as long as such engagement is not undertaken with the purpose or effect of changing or influencing control of the issuer and the shareholder is otherwise eligible to file on Schedule 13G.

- Engagement on corporate governance topics, such as removal of staggered boards, majority voting standards in director elections, and elimination of poison pills, without more, generally would not disqualify an otherwise eligible shareholder from filing on Schedule 13G if the discussion is being undertaken by the shareholder as part of a broad effort to promote its view of good corporate governance practices for all of its portfolio companies, rather than to facilitate a specific change in control in a company.
- By contrast, Schedule 13G would be *unavailable* if a shareholder engages with the issuer's management on matters that specifically call for the sale of the issuer to another company, the sale of a significant amount of the issuer's assets, the restructuring of the issuer, or a contested election of directors. [20]

[20] *See* Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, C&DI, Question 103.11 (July 24, 2016), available at: https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm

Who qualifies as an "institutional investor" under Section 13 of the Exchange Act?

Any person who would otherwise be required to file a Schedule 13D may file a Schedule 13G in lieu of the Schedule 13D if: (1) that person has acquired the securities in the ordinary course of business and not 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, including any transaction subject to Rule 13d-3(b), other than activities solely in connection with a nomination under Rule 14a-11; (2) that person has promptly notified any other person (or group within the meaning of Section 13(d)(3)) on whose behalf it holds, on a discretionary basis, securities exceeding 5% of the class, of any acquisition or transaction on behalf of that other person which might be reportable by that person under Section 13(d); and (3) that person is either:

- a broker or dealer registered under the Securities Act;
- a bank as defined in Section 3(a)(6) of the Securities Act;
- an insurance company as defined under Section 3(a)(19) of the Securities Act;
- an investment company registered under Section 8 of the Investment Company Act of 1940, as amended (the "1940 Act");
- registered as an investment adviser under Section 203 of the Investment Advisers Act of 1940, as amended, or under the laws of any state;

- an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA") that is subject to the provisions of ERISA (or any plan that is not subject to ERISA that is maintained primarily for the benefit of the employees of a state or local government or instrumentality, or an endowment fund);
- a parent holding company or control person (provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified under Rule 13d-1(b)(1)(ii)(A)-(J), does not exceed 1% of the securities of the subject class);
- a savings association as defined in Section 3(b) of the Federal Deposit Insurance Act;
- a church plan that is excluded from the definition of an investment company under Section 3(c)(14) of the 1940 Act);
- a non-U.S. institution that is the functional equivalent of any of the institutions listed in Rule 13d-1(b)(1)(ii)(A)-(L) (so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution); or
- a group, provided that all the members are persons specified in Rule 13d-1(b)(1)(ii)(A)-(J).[21]

Institutional investors must file a Schedule 13G within 45 days after the calendar year in which the investor holds more than 5% as of the year end or within 10 days after the end of the first month in which the person's beneficial ownership exceeds 10% of the class of equity securities computed as of the end of the month.

Who qualifies as an "exempt investor" under Section 13 of the Exchange Act?

A person will qualify as an exempt investor if it holds more than 5% of a class of subject securities at the end of the calendar year, but has not made an acquisition subject to Section 13(d), including persons that acquire all of its securities prior to the issuer registering the subject securities under the Exchange Act and persons that acquire no more than 2% of a class of subject securities within a 12-month period. For example, an investor may hold a significant portion of a private company's equity securities, but become subject to these filing requirements after the company's initial public offering, even though that investor has not purchased any additional shares. An "exempt investor" must file a Schedule 13G within 45 days after the end of the calendar year in which the event triggering the reporting obligation occurred.[22]

What are the obligations, under Section 13 of the Exchange Act, of a holder of more than 5% of a class of equity securities after the issuer completes an initial public offering (or other going public transaction)?

Any shareholder that holds 5% or more of an issuer's class of equity securities prior to an initial public

[21] *See* Rule 13d-1(b)(1)(i)-(ii)(A)-(K).

[22] *See* Rule 13d-1(d); and Section 13(d)(6)(B) of the Exchange Act; and C&DI, Question 101.05 (Jan. 3, 2014).

offering ("IPO"), or any other going public transaction, must file a Schedule 13G within 45 days of the IPO or going public transaction. Such a shareholder would only be required to file a Schedule 13D if that shareholder acquired greater than 2% of the issuer's equity securities within the 12-month period following the IPO or any other going public transaction (*see "Who qualifies as an 'exempt investor' under Section 13 of the Exchange Act?"*).

Is the information provided to the SEC on a Schedule 13D or Schedule 13G confidential?

No. Schedule 13D and Schedule 13G filings are a matter of public record, and any information provided will be available for review on the SEC website.

A beneficial owner must file its Schedule 13D or Schedule 13G with the SEC. Rule 12b-11 of the Exchange Act also requires a beneficial owner to deliver a copy to each applicable exchange on which the beneficial owner has securities registered. Beneficial owners may satisfy the delivery requirement by filing the Schedule 13D or Schedule 13G on the SEC's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR").[23]

Beneficial Ownership

What is the definition of "beneficial ownership" under Section 13(d) and 13(g)?

Under Rule 13d-3 of the Exchange Act ("Rule 13d-3"), a person is a beneficial owner of an equity security if that person, either directly or indirectly, has or shares: (1) voting power, including the power to vote, or to direct the voting of, the security; or (2) investment power, including the power to dispose, or to direct the disposition of, the security. Further, any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement, or any other contract, arrangement, or device for the purpose or effect of divesting the person of beneficial ownership of a security or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements under the Exchange Act will be deemed to be the beneficial owner of the security (*see "What constitutes a 'group' for purposes of beneficial ownership?"*). To calculate total beneficial ownership, all securities of the same class are aggregated together.

The First, Second, Third, and Seventh U.S. Federal Circuit Courts have all affirmed that the crux of Rule 13d-3 rests not on whether a person is the record owner of the stock, but instead, on whether a particular person can actually vote the shares.[24]

Rule 13d-3's wide net also encompasses persons who have the right to acquire beneficial ownership. Generally, a person is deemed a beneficial owner of a security if that person has the right to acquire beneficial ownership of an equity security within 60 days.[25]

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[23] *See* Rule 13d-101.

[24] *See, e.g.*, *Calvary Holdings, Inc. v. Chandler*, 948 F.2d 59, 64 (1st Cir. 1991); *GAF Corp.*, 453 F.2d at 716; and *Bath Industries*, 427 F.2d at 112.

[25] Under Rule 13d-3, the right to acquire beneficial ownership is established (i) through the exercise of any option, warrant or right; (ii) through the conversion of a security; (iii) through the power to revoke a trust, discretionary account, or similar arrangement; or (iv) upon the automatic termination of a trust, discretionary account or similar arrangement. *See id*.

What types of securities are covered for purposes of "beneficial ownership" under Section 13 of the Exchange Act?

Sections 13(d) and 13(g) apply to: (1) any "equity security" of a class that is registered under Section 12 of the Exchange Act; (2) any equity security of any insurance company that would have been required to be so registered except for the exemption contained in Section 12(g)(2)(G) of the Exchange Act; or (3) any equity security issued by a closed-end investment company registered under the 1940 Act.[26] "Equity security" has the meaning set forth in Rule 3a11-1 under the Exchange Act.[27]

As noted under Section 13(d), the term "equity securities" does not include securities of a class of non-voting securities.[28] Moreover, the Division has explained that certain types of securities, such as American Depositary Receipts, "are not considered a separate class of equity securities for purposes of calculating beneficial ownership of securities."[29]

When does a person maintain "voting power" over "equity securities" under Section 13 of the Exchange Act?

The SEC has noted in its guidance that "voting power" is synonymous with "the ability to control or influence the voting or disposition of the securities." Accordingly, "the mere possession of the legal right to vote securities under applicable state or other law (*i.e.*, a management proxy committee) may not be determinative of who is a beneficial owner of such securities inasmuch as another person or persons may have the power whether legal, economic, or otherwise, to direct such voting."[30] If one person has "possession of the legal right to vote while another has the actual power to vote, only the individual able to direct the voting must file a Schedule 13D."[31]

For example, in *First National Bank of Chicago*, the SEC Staff took no action against the First National Bank of Chicago after it amended its standard secured note forms to delete the provisions that granted it the power to vote prior to default, prohibiting the bank (as pledgee) from voting prior to default.[32] Likewise, in *Rio Grande Industries*, the SEC Staff took no action against trustees of pension funds under the Santa Fe Plan (the "SF Plan") who simply maintained the authority to vote shares in accordance with the directions of the SF Plan's participants.[33] The SEC Staff has similarly granted no-action relief under Rule 13d-3 to clearinghouses, wholly

[26] *See* §§ 13(d) and 13(g) of the Exchange Act.

[27] Rule 3a11-1 under the Exchange Act defines an "equity security" as any: (1) stock or similar security, certificate of interest or participation in any profit sharing agreement, preorganization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, certificate in a business trust; (2) security future on any such security; (3) convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security; (4) such warrant or right; or (5) put, call, straddle, or other option or privilege of buying such a security or from selling such a security to another without being bound to do so.

[28] *See Gulf United*, SEC no-action letter (Apr. 28, 1979) (". . . [A]ll non-voting securities have been removed from the definition of an equity security stated in Rule 13d-1(d) . . .").

[29] Ownership Reports and Trading By Officers, Directors and Principal Security Holders, SEC Release No. 34-29226 (May 23, 1991) ("[a] reporting obligation under Section 13(d) is determined by ownership of the class of deposited securities, including ownership of those securities through ADRs.").

[30] Adoption of Beneficial Ownership Disclosure Requirements, Exchange Act Release No. 13291, WL 185650, at *5 (February 4, 1977).

[31] *Calvary Holdings, Inc.*, 948 F. 2d at 62-63.

[32] *First National Bank of Chicago*, SEC no-action letter (July 24, 1978).

[33] *Rio Grande Industries, Inc.*, SEC no-action letter (Apr. 5, 1989).

owned subsidiaries with no ability to initiate a proposal for acquisition or disposition of shares, and minority partners, where the majority partners maintained all discretion over voting stock owned by the partnership.[34] U.S. courts have similarly established that "one who has the right to determine how the stock is voted has a beneficial interest" under Rule 13d-3.[35] Accordingly, in *Calvary Holdings, Inc. v. Chandler*, the Court held that merely owning a stock in name only, and without the ability to dispose of or vote the stock, is not tantamount to beneficial ownership.

When does a person maintain "investment power" over "equity securities" under Section 13 of the Exchange Act?

Investment power includes "the power to dispose, or to direct the disposition, of [a] security."[36] The SEC has explained that a person will be said to have investment power over securities where the person has the "ability to change or influence control." Investment power is not predicated on legal title to stock, whether a particular person is the registered owner of the security or whether the security is in the name of a particular person. Further, investment power may be maintained even where a particular person may not participate in the economic benefits of a particular security. Investment power may be held by a single beneficial owner or shared among a group of beneficial owners.[37]

In *Wellman v. Dickinson*, the Court of Appeals for the Second Circuit noted that Congress intended investment power to include "[t]he power to dispose of a block of securities represent[ing] a means for effecting changes in corporate control . . ."[38] In *CSX Corp. v. Children's Investment Fund Management (UK) LLP et al.*, the Court of Appeals for the Second Circuit further noted that one must "generally . . . have some measure of active control . . . that [is] . . . exercisable." The court in *CSX Corp.* found that "merely having a long position in a cash-settled total-return equity swap [did] not constitute having the power, directly or indirectly, to direct the disposition of shares that a counterparty purchases to hedge its swap positions, and thus does not constitute having 'investment power' for purposes of Rule 13d–3(a)."[39]

What constitutes a "group" for purposes of beneficial ownership?

The term "beneficial owner" is not defined under Section 13(d). However, under Rule 13d-3, a beneficial owner encompasses "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise" maintains any voting or investment power with respect to a security. An aggregation of persons or entities (*i.e.*, a "group") may be the beneficial owner of 5% or more of a particular registered security to the extent they "act

[34] *See, e.g.*, *The Southland Corporation*, SEC no-action letter (Aug. 10, 1987); *Depository Trust Company*, SEC no-action letter (Feb. 23, 1979); *Bank America Capital Corporation*, SEC no-action letter (May 6, 1979); and *Overseas Shipbuilding Group, Inc.*, SEC no-action letter (Oct. 31, 1977).

[35] *Bath Industries, Inc. v. Blot*, 305 F.Supp. 526, 537 (E.D. Wis. 1969).

[36] *See* Rule 13d-3(a)(2).

[37] *See* Filing and Disclosure Requirements Relating to Beneficial Ownership, Securities Act Release No. 5925, Exchange Act Release No. 14,692 (Apr. 28, 1978).

[38] *See Wellman v. Dickinson*, 682 F.2d 355, 365 (2d Cir. 1982).

[39] *See CSX Corp. v. Children's Investment Fund Management (UK) LLP, et al.*, 654 F.2d 276, 300-01 (2d Cir. 2011).

for the purpose of indirectly or directly obtaining securities as part of a 'plan or scheme' . . . to be the beneficial owner of such securities." The fundamental factor for determining whether an aggregation of persons constitutes a group is whether the persons are "combined in furtherance of a common objective."[40] Such a "concerted action" by the group's members does not need to be formally memorialized in writing.[41] The legislative history of Section 13(d)(3) under the Exchange Act expressly establishes congressional intent to ensure that those groups are subject to the requirements of Schedule 13D or Schedule 13G, even where the individuals alone would not exceed the 5% reporting threshold.[42] However, the SEC Staff has made it clear that the formation of a group under Section 13 does not, without more, result in the "attribution of beneficial ownership to each group member of the securities beneficially owned by other members."[43]

Must each member of a group file a Schedule 13D or Schedule 13G individually?

Under Rule 13d-5, a group's filing obligation on either Schedule 13D or Schedule 13G may be satisfied by either a single joint filing among all the members of the group or by a single filing by each member of the group. A group may file a single statement concerning the information required by Schedule 13D or Schedule 13G with respect to the same securities, provided that:

- each person on whose behalf the statement is filed is individually eligible to use the schedule on which the information is filed;
- each person on whose behalf the statement is filed is responsible for (i) the timely filing of the statement and any amendments made to the statement and (ii) the completeness and accuracy of the information concerning that person contained in the statement—however, each individual person is not responsible for the completeness or accuracy of the information concerning the other members of the group "unless such person knows or has reason to believe that such information is inaccurate"; and
- the statement identifies all group members, "contains the required information with regard to each such person, indicates that such statement is filed on behalf of all such persons, and includes, as an exhibit, their agreement in writing that such a statement is filed on behalf of each of them."[44]

To the extent the group's members elect to make their own filings, each filing must identify all members of the group; however, the disclosed beneficial ownership information concerning the other persons making the filing "need only reflect information which the filing person knows or has reason to know."[45]

[40] *Bath Industries*, 427 F.2d at 111. *See also Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F.2d 207, 217 (2d Cir. 1973); *Texasgulf Inc., v. Canada Development Corp.*, 366 F.Supp. 374, 403 (S.D.TX. 1973)

[41] *Securities and Exchange Commission v. Savoy Indus., Inc.*, 587 F.2d 1149, 1163 (D.C. Cir. 1978)

[42] *See Wellman*, 682 F.2d at 362-63 (citing S. Rep. No. 550, 90th Cong., 1st Sess. 8 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 8-9 (1968), reprinted in (1968) U.S. Code Cong. & Admin. News 2811, 2818).

[43] *See* C&DI, Question 104.06.

[44] *See* Rule 13d-1(k)(1).

[45] *See* Rule 13d-1(k)(2).

As previously discussed, when two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of an issuer's equity securities, the group shall be deemed to have acquired beneficial ownership for purposes of Section 13(d) and Section 13(g) as of the date of the agreement. However, a group will be deemed to not have acquired beneficial ownership of equity securities as a group (in a transaction not involving a public offering) provided that:

- all the members of the group are persons specified in Rule 13d-1(b)(1)(ii);
- the purchase is in the ordinary course of each group member's business and not with the purpose nor the effect of "changing or influencing control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to Rule 13d 3(b)";
- there is no agreement among or between any members of the group to act together in connection with acquiring an issuer's securities (except for the purpose of facilitating the specific purchase involved); and
- the only actions among or between the group members with respect to the issuer's securities subsequent to the closing date of the non-public offering are those which are "necessary to conclude ministerial matters directly related to the completion of the offer or sale of the securities."[46]

Must a holder of more than 5% of derivative securities in an issuer make a filing on Schedule 13D or Schedule 13G?

Yes. Under the SEC's current rules, holders of SBSs may be subject to beneficial ownership reporting requirements where an SBS "confers voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of [an SBS]), grants a right to acquire an equity security, or is used 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 . . ."[47]

Under Rule 13d-3(a), where an SBS provides a person with "exclusive or shared . . . voting and/or investment power over an equity security through a contractual term of the SBS or otherwise," the person is considered a beneficial owner of the equity security.[48] Furthermore, in accordance with Rule 13d-3(b), if a person utilizes an SBS "with the purpose or effect of divesting a person of beneficial ownership or preventing the vesting of beneficial ownership as part of a plan or scheme to evade [the reporting requirements] under Section 13(d) or 13(g)," that person will be deemed to be a beneficial owner of the equity security.[49] Lastly, if a person has the right, through an SBS, to acquire an equity security within 60 days or holds that right "with the purpose or effect of changing or influencing control of the issuer of

[46] *See* Rule 13d-5 *et seq.*
[47] Beneficial Ownership Reporting Requirements and Security-Based Swaps, Exchange Act Release No. 34-64087 (Mar. 17, 2011), at 5.
[48] *Id.*
[49] *Id.*

the security for which the right is exercisable," the person will be deemed a beneficial owner under Rule 13d-3(d)(1).

As previously discussed, Section 766 of the Dodd-Frank Act added new Section 13(o) to the Exchange Act, which establishes that ". . . a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a[n SBS], only to the extent that the [SEC], by rule, determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the [SBS], or class of [SBS], provides incidents of ownership comparable to direct ownership of the equity security . . ."[50] Section 13(o) of the Exchange Act and Section 766 of the Dodd-Frank Act became effective on July 16, 2011.[51] On March 17, 2011, the SEC reproposed to adopt certain provisions of Rule 13d-3 and Rule 16a-1 of the Exchange Act to clarify that "persons who purchase or sell [SBSs] will remain within the scope of these rules to the same extent as they are now."[52] The impetus for the reproposal was the SEC's concern that Section 766 of the Dodd-Frank Act "may be interpreted to render the beneficial ownership determinations made under Rule 13d-3 inapplicable to a person who purchases or sells [an SBS]."[53] The reproposal was confirmed on June 8, 2011, and went effective on July 16, 2011.[54]

U.S. courts have also held that holders of other forms of derivative contracts, in addition to SBSs, will constitute beneficial ownership for purposes of Section 13(d) or 13(g).

For example, in *CSX Corporation v. The Children's Investment Fund Management (UK) LLP et al.*, the District Court ruled that holders of cash-settled equity total return equity swaps ("TRSs") held by short counterparties "would be deemed to beneficially own those shares for purposes of [the] Williams Act's disclosure requirement."[55] In *CSX Corporation*, CSX Corporation, a U.S. publicly held railroad company, claimed that funds associated with two hedge funds, The Children's Investment Fund ("TCI") and 3G Capital Partners Ltd., violated Section 13(d) when they failed to timely disclose the formation of a group, and that TCI violated Section 13(d) when it acquired a significant amount of CSX Corporation's outstanding equity prior to launching a takeover attempt of CSX Corporation.[56] In making such determination that TCI was a beneficial owner of the TRSs, the District Court noted that the definition of beneficial ownership under Rule 13d-3(a) is very broad "as is appropriate to its object of ensuring disclosure 'from all . . . persons who have the ability [even] to influence control'" (*see* "*When does a person maintain 'investment power' over 'equity securities' under Section 13 of the Exchange Act?*").[57] Moreover, the definition "does not confine itself to the 'mere possession of the legal right to vote [or direct the acquisition or disposition of] securities,' but looks instead to all of the facts and circumstances to identify

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[50] *See* the Dodd-Frank Act, § 766.
[51] *Id.* at § 774.
[52] Exchange Act Release No. 34-64087, *supra*, note 47 at 1.
[53] *Id.* at 2.
[54] *See* Beneficial Ownership Reporting Requirements and Security-Based Swaps, SEC Release No. 34-64628 (June 8, 2011).

[55] *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, et al.*, 562 F. Supp. 2d 511, 512 (S.D.N.Y. 2008).
[56] *Id.* at 518-19.
[57] *See id.* at 545-46 (*citing* Interpretive Release on Rules Applicable to Insider Reporting and Trading, Exchange Act Release No. 34-18144 (Oct. 1, 1981)).

situations in which one has even the ability to influence voting, purchase, or sale decisions of its counterparties by 'legal, economic, or other' means" (*see "When does a person maintain 'voting power' over 'equity securities' under Section 13 of the Exchange Act?"*).[58]

Must holders of securities issued under Regulation A+ report beneficial ownership on either Schedule 13D or Schedule 13G?

No, unless the issuer contemporaneously lists its securities on a national securities exchange, such that it must register those securities under the Exchange Act.

Must a broker-dealer or investment adviser file a Schedule 13D or Schedule 13G?

A broker-dealer or investment adviser may be required to file a Schedule 13D or Schedule 13G, depending on whether the broker-dealer or investment adviser is a beneficial owner of the equity securities.[59] The SEC has noted that "a registered representative of a broker-dealer will [typically] not be deemed to beneficially own common stock held in non-discretionary customer accounts."[60] However, to the extent that such a registered representative "has or shares the de facto power to direct the voting or disposition of the securities in customer accounts, the registered representative may be deemed to beneficially own securities held by customers in non-discretionary accounts."[61]

[58] *Id.* at 546 (*citing* Adoption of Beneficial Ownership Disclosure Requirements, 42 Fed. Reg. 12, 342, 12,344 (Mar. 3, 1977).
[59] *In the Matter of Harvey Katz,* Exchange Act Release No. 20,893 (Apr. 25, 1984).
[60] *Id.*
[61] *Id.*

Schedule 13D Filing

What information must be provided on a Schedule 13D?

A beneficial owner that files on Schedule 13D must provide specific and detailed information, as required under Rule 13d-101 under the Exchange Act ("Rule 13d-101"). Under Schedule 13D, the following items must be disclosed:

- ***Item 1. Security and Issuer.*** The filing must include the:
  - title of the class of equity securities that is the subject of the Schedule 13D; and
  - name and address of the issuer's principal executive offices.
- ***Item 2. Identity and Background.***
  - A natural person must provide his or her:
    - name;
    - residence of business address;
    - principal occupation or employment and the name of the principal business and address in which that employment is conducted;
    - whether or not the person has been convicted in the last five years in a criminal proceeding, including the dates, nature of conviction, name and location of court, penalties imposed, or other disposition of the case;

- whether or not the person over the last five years was a party to a civil proceeding of a judicial or administrative body, and if such a proceeding resulted in a judgment, decree or final order enjoining future violations of, or prohibiting or mandating activities subject to, federal or state securities laws or finding any violation with respect to those laws, and if so, identify and describe such proceedings and summarize the terms of the judgment; and
- country of citizenship.

- ***Item 3: Source and Amount of Funds or Other Consideration.*** A filer must:
    - provide the source and the amount of funds or other consideration used or to be used in making the purchases;
    - disclose whether any part of the purchase price is or will be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, trading or voting the securities;
    - provide a description of the transaction and the names of the parties thereto;
    - provide a description of the method of acquisition (if the securities were acquired other than by purchase); and
    - where *material,* provide additional information with respect to prior acquisitions not previously reported under Section 13(d).

- ***Item 4: Purpose of Transaction.*** The filer must state the purpose(s) of the acquisition of securities of the issuer and describe any plans or proposals that the filer may have which would result in:
    - the acquisition by any person of additional securities of the issuer, or the disposition of the securities of the issuer;
    - an extraordinary corporate transaction (*e.g.*, a merger, reorganization or liquidation, involving the issuer or any of its subsidiaries);[62]
    - a sale or transfer of a *material amount* of assets of the issuer or any of its subsidiaries;
    - any change in the present board of directors or management of the issuer, including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board;
    - any other material change in the issuer's business or corporate structure;

[62] *See SEC v. Teo*, 746 F.3d 90, 99 n.10 (3d Cr. 2014) ("[a] disclosable matter under Rule 13d-101 includes a reporting person's plan which would result in an extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer.").

- changes in the issuer's charter, bylaws, or similar documents or other actions which may impede the acquisition of control of the issuer by any person;
- a class of securities of the issuer to be delisted from a national securities exchange or to be quoted in an interdealer quotation system of a national securities association;
- a class of the issuer's equity securities becoming eligible for termination of registration under Section 12(g)(4) of the Exchange Act; or
- any other similar action.

The SEC has affirmed, however, that for purposes of Item 4,"[s]tale, generic disclosures that simply reserve the right to engage in certain corporate transactions do not suffice when there are material changes to those plans, including actions to take a company private."[63] As noted in SEC staff guidance, "[a] plan or proposal, as those terms are used in Item 4, is not deemed to exist only upon execution of a formal agreement or commencement of a tender offer, solicitation or similar transaction."[64]

- ***Item 5: Interest in Securities of the Issuer.*** A filer must:
  - provide the aggregate number and percentage of the class of securities identified in Item 1, including the aggregate number and percentage of class of securities of those that comprise a group within the meaning of Section 13(d)(3) of the Exchange Act;
  - describe any transactions in the class of securities reported on that were effected during the past 60 days or since the most recent filing of Schedule 13D, whichever is less, by the persons named in Item 5[65];
  - provide a statement on whether any other person is known to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, the securities. If the interest relates to more than 5% of the class, the person should be identified; and
  - include the date on which the reporting person ceased to be the beneficial owner of more than 5% of the class of securities, as applicable.
- ***Item 6: Contracts, Arrangements, Understandings, or Relationships with Respect to Securities of the Issuer.***
  - The filer must describe any contracts, arrangements, understandings, or

[63] *See* U.S. Securities and Exchange Commission, "Corporate Insiders Charged for Failing to Update Disclosures Involving 'Going Private' Transactions," Press Release, Mar. 13, 2015, available at https://www.sec.gov/news/pressrelease/2015-47.html#.VRA6u_nF98E.

[64] *See* SEC Questions and Answers of General Applicability, Question No. 110.06 (citing *In the Matter of Tracinda Corporation*, Exchange Act Release No. 58451 (Sept. 3, 2008)).

[65] The instructions for Schedule 13D state that Item 5 shall include the following information: (1) the identity of the person covered by Item 5(c) who effected the transaction; (2) the date of the transaction; (3) the amount of securities involved; (4) the price per share or unit; and (5) where and how the transaction was effected. *See* Rule 13d-101.

relationships (legal or otherwise) among the persons provided in Item 2 and between those persons and any person with respect to any securities of the issuer.

- ***Item 7: Material to be Filed as Exhibits.*** A filer must provide:
    - copies of written agreements relating to filing of joint acquisition statements as required by Rule 13d-1(k);
    - copies of all written agreements, contracts, arrangements, understandings, plans, or proposals related to:
        - borrowing of funds to finance the acquisition (per Item 3);
        - acquisition of issuer control, liquidation, sale of assets, merger, or change in business or corporate structure, or any other matter (per Item 4); and
        - transfer or voting of the securities, finder's fees, joint ventures, options, puts, calls, guarantees, of loans, guarantees against loss or of profit, or the giving or withholding of any proxy (per Item 6).

- ***Signature.*** The SEC requires that all Schedule 13D filers attest that "after reasonable inquiry and to the best of [his or her] knowledge and belief, [the filer] certif[ies] that information set forth in the Schedule 13D is true, complete and correct."

Schedule 13G Filing

Who may file on a form Schedule 13G?

Persons that fall within Section 13(d)'s exemptions, namely passive investors, qualified institutional investors or exempt investors, may file on a form Schedule 13G.

What information must be provided on a Schedule 13G?

Rule 13d-102 under the Exchange Act specifies the elements that must be included for a Schedule 13G filing to be deemed complete, including a cover page and the following "Items":

- ***Cover Page.*** The filer must provide a cover page that includes general information about the filer (*inter alia,* name of reporting persons, citizenship or place of organization, whether the shares beneficially owned are held by a group, classification of reporting person (*e.g.*, broker-dealer, bank, investment company, etc.) and specify which rule is being relied upon to file a Schedule 13G (*i.e.*, Rules 13d-1(b); 13d-1(c); or 13d-1(d)).

- ***Items.*** Schedule 13G requires the following items to be provided:
    - ***Item 1(a).*** Name of the issuer.
    - ***Item 1(b).*** Address of the issuer.
    - ***Items 2(a)-(e).*** Name, address or principal business office (or, if none, residence), citizenship, title of class of securities, and CUSIP number of the securities.

- ***Item 3.*** Specify whether the Schedule 13G is being filed under Rule 13d-1(b) (the "institutional investor" exemption) or Rule 13d-2(b) or (c) (making an amendment to an already filed Schedule 13G).

- ***Item 4.*** Information regarding the aggregate number and percentage of the class of securities of the issuer identified in Item 1 (*i.e.*, the number of shares over which the person has sole or shared voting or investment power).

- ***Item 5.*** Disclosure as to whether the Schedule 13G is being filed to report that the reporting person has as of the date thereof ceased to be the beneficial owner of more than 5% of the class of securities.

- ***Item 6.*** Disclosure of whether any other person is known to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, the securities. If the interest relates to more than 5% of the class, the person must be identified.

- ***Item 7.*** Disclosure as to whether a parent holding company or control person has filed the Schedule 13D under Rule 13d-1(b)(1)(ii)(G). This item should include an exhibit stating the identity and the "Item 3" classification of the relevant subsidiary.

- ***Item 8.*** If the Schedule 13D has been filed by a group under Rule 13d-1(b)(1)(ii)(J), Item 8 should include an exhibit that provides the identity and "Item 3" classification of each member of the group.

- ***Item 9.*** The filer may furnish as an exhibit a notice of dissolution of a group, stating the date of the dissolution and that all future filings with respect to transactions in the security reported on Schedule 13G will be filed individually.

- ***Item 10.*** A person that files a Schedule 13G based on either Rule 13d-1(b) or Rule 13d-1(c) must certify that the securities that are the subject of the Schedule 13G were acquired and held in the ordinary course of business and were not acquired and not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities (or any transaction having that purpose or effect). A filer that files based on Rule 13d-1(b)(1)(ii)(J), or if filed by a group under Rule 13d-1(b)(1)(ii)(K) that contains at least one non-U.S. institution member eligible to file under Rule 13d-1(b)(1)(ii)(J), must

certify that the foreign regulatory scheme of the non-U.S. institutional member is substantially comparable to the regulatory scheme applicable to the functionally equivalent U.S. institution(s).

Amendments and Changes to a Schedule 13D or 13G Filing

When may a "beneficial owner" that has filed a Schedule 13D instead file a Schedule 13G?

Any person who has filed a Schedule 13D under paragraphs (e), (f), or (g) of Rule 13d-1 may file a Schedule 13G where the person qualifies under Rule 13d-1(b) or (c). In accordance with Rule 13d-1(h), any person who has filed a Schedule 13D may instead report its beneficial ownership on Schedule 13G as long as the shares are no longer held with control intent.[66] Any holder who intends to switch to a Schedule 13G must meet the necessary requirements of Rule 13d-1(b) or (c). Where a security holder was not originally eligible to file a Schedule 13G and instead filed a Schedule 13D to report beneficial ownership, but later files a final amendment on Schedule 13D to report that its beneficial ownership of a particular class of securities fell below 5%, then the security holder may qualify to file a Schedule 13G if its beneficial ownership of the securities again increases above the 5% threshold.

[66] *See* Rule 13d-1. *See also* C&DI, Question 103.07.

When must a beneficial owner that has previously filed a Schedule 13G instead file a Schedule 13D?

A person that has previously filed a Schedule 13G to report beneficial ownership of at least 5% of a class of equity securities, or is required to report on Schedule 13G but has not yet filed with the schedule, must instead file a Schedule 13D within 10 days, and shall continue to be required to file a Schedule 13D, if the person:

- has acquired or holds the securities with a 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; and
- is at that time the beneficial owner of more than 5% of a class of "equity securities."[67]

When must a Schedule 13D or Schedule 13G be amended?

Where a material change occurs in the facts set forth in a Schedule 13D or Schedule 13G filed under Rule 13d-1, including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person or persons who were required to file the statement *must promptly* file with the SEC an amendment disclosing such a change.[68] For example, an "acquisition or disposition of beneficial ownership of securities in an amount equal to 1% or more of the class of securities shall be deemed 'material.'"[69] However, acquisitions or dispositions of securities that constitute

[67] *See* Rule 13d-1.
[68] *See* Rule 13d-2(a).
[69] *Id.*

less than 1% of a particular class of securities may nevertheless be "material" on a case by case basis.[70]

The SEC Staff has further explained that a Schedule 13G filer will be required to file an annual amendment to the Schedule 13G within 45 days after the end of the calendar year to "report any changes in the information previously disclosed."[71] A Schedule 13G will not need to be amended if there have been no changes to the information previously disclosed or if the changes are limited to the "percentage of securities owned by the filing person resulting solely from a change in the aggregate number of the issuer's securities outstanding."[72]

Consequences of Failing to File a Timely or Complete Schedule 13D or Schedule 13G

What are the consequences of failing to file a required amendment to a Schedule 13D or Schedule 13G in a timely manner?

In the case of a security holder that has failed to make required amendments to its Schedule 13D or Schedule 13G in a timely manner (*i.e.*, any material changes), the holder must immediately amend its schedule to disclose the required information. The SEC Staff has explained that, "[r]egardless of the approach taken, the security holder must ensure that the filings contain the information that it should have disclosed in each required amendment, including the dates and details of each event that necessitated a required amendment."[73] However, the SEC Staff has also affirmed that, irrespective of whether a security holder takes any of these actions, a security holder may still face liability under the federal securities laws for failing to promptly file a required amendment to a Schedule 13D or Schedule 13G.[74]

Is a Schedule 13D or Schedule 13G filer subject to the anti-fraud provisions of the Exchange Act?

Yes. A filer on Schedule 13D or Schedule 13G is subject to the anti-fraud provisions of Section 10(b) of the Exchange Act ("Section 10(b)") and Rule 10b-5 ("Rule 10b-5") thereunder, as well as Rule 12b-20 of the Exchange Act ("Rule 12b-20").

Rule 10b-5 makes it illegal for any person to make an untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or to use any measure or engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[75] However, absent a duty to disclose, silence is not misleading under Rule 10b-5.[76] The filer must act with scienter, or a "mental state embracing intent to deceive, manipulate or defraud."[77]

Rule 12b-20 requires that a filer provide "such further material information . . . as may be necessary to make the [Schedule 13D or 13G filing], in the light of circumstances under which they are made not

[70] *Id.*
[71] *See* C&DI, Question 104.02.
[72] *Id.*

[73] *See id.* at Question 104.03.
[74] *Id.*
[75] *See, e.g.*, *Levie v. Sears Roebuck & Co.*, 2006 WL 756063 (2006).
[76] *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988).
[77] *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

misleading."[78] A disclosure is said to be misleading where it is "inaccurate in [itself] or because [it omits] information necessary to prevent the statements made from being misleading."[79]

However, such a provision does not transform Section 13(d) and Section 13(g) into a "mandate to disclose any and all material information, even if unrelated to the areas of disclosure required by Section 13(d) [and Section 13(g)]."[80]

Can a filer that files a misleading Schedule 13D or Schedule 13G face private rights of action under Section 10(b) and Rule 10b-5?

Yes. Although Section 10(b) and Rule 10b-5 do not create an express civil remedy for violations thereof, such a remedy has been well established by U.S. courts.[81] Private civil actions have been brought under Section 10(b) and Rule 10b-5, for example, for "material corporate misstatements or nondisclosures, insider trading, and corporate mismanagement." A private civil action, however, can only be brought under Rule 10b-5 in connection with a Schedule 13D or Schedule 13G filing if there is: (1) a material misrepresentation or omission made by the defendant; (2) scienter on the part of the defendant; (3) a connection between a misrepresentation or omission and purchase or sale of a security; (4) reliance upon the misrepresentation or omission; and (5) resulting economic loss.[82]

Further, a claim may only be brought under Section 10(b) and Rule 10b-5 where a person had the requisite "intent, knowledge, or in some cases, 'recklessness' to commit a misrepresentation or omission in connection with an offering (*i.e.*, scienter).[83] A statement is said to contain a material misrepresentation or omission where it is "misleading" as indicated by its "nature considered alone, or because it is not explained in a way to obviate its otherwise misleading character."[84]

Can a filer that files a misleading Schedule 13D or Schedule 13G face civil action by the SEC or company shareholders under Section 10(b) and Rule 10b-5?

Yes. A filer may face an SEC enforcement action for a violation of Section 13(d) or Section 13(g) and the rules thereunder. However, there is neither an express nor implied private right of action for damages under Section 13(d) and Section 13(g).[85]

Instead, Section 18(a) of the Exchange Act ("Section 18(a)") provides an explicit, albeit non-exclusive, remedy to shareholders who relied on misleading or false information provided in a Section 13(d) filing in the context of the purchase or sale of securities.[86] Section 18(a) specifically states that "any person who shall make or cause to be made any

[78] *See* Rule 12b-20.
[79] *Telenor East Invest AS v. Eco Telecom Ltd.* 2005 WL 2239999, at *3 (S.D.N.Y. 2005).
[80] *Kaufman and Broad, Inc. v. Belzberg,* 522 F. Supp. 35, 43 (S.D.N.Y. 1981).
[81] *See, e.g., Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975); *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 150 (1972).
[82] *See* Rule 10b-5. *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).
[83] *Hollinger v. Titan Capital Corp*., 914 F.2d 1564, 1568–69 (9th Cir. 1990).
[84] *Gilbert v. Nixon,* 429 F. 2d 348, 356 (10th Cir. 1970).
[85] *See Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.,* 286 F.3d 613, 619 (2d Cir. 2002).
[86] *See* 15 U.S.C. § 78r(a). *See also Levie, supra*, note 75 at 3.

statement in any . . . [filing] pursuant to . . . any [SEC] rule or regulation . . . which statement was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person . . . who, in reliance upon such statement shall have purchased or sold a security at a price which was affected by such statement, for damages . . ."[87] Unlike in a private civil claim under Section 10(b) and Rule 10b-5, where a plaintiff must merely plead "constructive or presumptive reliance," a plaintiff must instead plead and prove reliance on a false or misleading statement to succeed in a private civil claim under Section 18(a).[88]

Does the SEC have any statutory authority to enforce Section 13 under the Exchange Act?

The SEC may bring an enforcement action, in the context of a Schedule 13D or Schedule 13G filing, for violations of Section 13(d), Section 13(g), Rule 10b-5 and Section 10(b).

However, to bring a claim under Rule 10b-5, the SEC must specifically show: (1) a material misrepresentation or omission made by the defendant; (2) scienter on the part of the defendant; and (3) a connection between a misrepresentation or omission and purchase or sale of a security.

The SEC may seek civil remedies in the form of injunctive relief, a cease and desist order, monetary penalties, and other forms of equitable relief (*e.g.*, disgorgement of profits). The SEC will consider the following factors in determining the appropriate civil remedies:

- the degree of the defendant's actions;
- the degree of scienter involved;
- whether the infraction is an "isolated occurrence";
- whether the defendant continues to maintain that his or her past conduct was blameless; and
- whether, because of his or her professional occupation, the defendant might be in a position where future violations could be anticipated.[89]

Can a filer face criminal action in connection with its Schedule 13D or Schedule 13G?

Yes. Under Section 32 of the Exchange Act, criminal sanctions may extend to the willful violation of Section 13(d) and Section 13(g).[90] The U.S. Department of Justice, which prosecutes criminal offenses under the Exchange Act, may seek numerous penalties against any person that violates the Exchange Act and any rules thereunder, including a monetary fine of up to $5,000,000, imprisonment for up to 20 years and/or disgorgement.[91]

Has the SEC showed a willingness to charge and prosecute violators of Section 13(d) and Section 13(g)?

Yes. In her October 2013 speech, former Chair of the SEC Mary Jo White affirmed that the SEC would use the "broken windows" theory as the underpinnings for the SEC's aggressive enforcement strategy—the SEC would no longer tolerate the minor violations of securities laws

[87] *See* 15 U.S.C. § 78r(a).
[88] *Id. See also Heit v. Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

[89] *SEC v. Blatt,* 583 F.2d 1325, 1334 n. 29 (5th Cir. 1978).
[90] *See* 15 U.S.C. § 78ff.
[91] *Id.*

that commonly "feed bigger ones."[92] Accordingly, the SEC has showed a willingness to charge and prosecute officers, directors, and major shareholders with violations of Section 13(d) and Section 13(g). For example, in March 2015, the SEC charged numerous persons – both U.S. and non-U.S. – for violating Section 13(d).[93] In September 2014, the SEC also issued orders that alleged violations of Section 13(d) by officers and directors of public companies, beneficial owners of publicly-traded companies, investment firms and six publicly-traded companies.[94]

Non-U.S. Persons and Section 13 Under the Exchange Act

Are non-U.S. persons required to similarly make filings on either a Schedule 13D or 13G?

Yes. All beneficial owners, both U.S. and non-U.S., are subject to the disclosure requirements under the Exchange Act and, therefore, must file a statement on either Schedule 13D or Schedule 13G. However, amendments made to the Williams Act in 2008 now enable a foreign institution to file as a qualified institutional investor under Rule 13d-1(b)(ii).[95]

A foreign beneficial owner relying on Rule 13d-1(b)(1)(ii) would need to file a Schedule 13G within 45 days after the calendar year in which it held more than 5% as of the year end or within 10 days after the end of the first month in which the foreign beneficial owner's ownership exceeds 10% of the class.[96] A foreign beneficial owner eligible to file on Schedule 13G based on the "passive investor" exemption would need to file a Schedule 13G within 10 business days after becoming a 5% beneficial holder (*see "Who qualifies as a 'passive investor' under Section 13 of the Exchange Act?"*).

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[92] *See* SEC Chair Mary Jo White, "Remarks at the Securities Enforcement Forum," Oct. 9, 2013, available at https://www.sec.gov/News/Speech/Detail/Speech/1370539872100.

[93] *See* "Corporate Insiders Charged for Failing to Update Disclosures Involving 'Going Private' Transactions," *supra*, note 63.

[94] *See also* "SEC Announces Charges Against Corporate Insiders for Violating Laws Requiring Prompt Reporting of Transactions and Holdings," SEC Press Release, Sept. 10, 2014, available at https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678.

[95] *See* Amendments to Beneficial Ownership Reporting Requirements, Exchange Act Release No. 34-39538 (Jan. 12, 1998).

[96] *Id.*