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Regulatory Update

SEC Reporting Obligations Under Section 13 and Section 16 of the Exchange Act

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This legal update summarizes (a) the reporting requirements under Section 13(d), (f), (g) and (h) of the Securities Exchange Act of 1934, as amended (the Exchange Act), which are generally applicable to persons that own, or exercise investment discretion over accounts that own or trade, publicly traded or exchange listed equity securities, and (b) the reporting requirements under Section 16 of the Exchange Act, which are applicable to persons considered to be "insiders" of public companies. While the persons subject to the reporting requirements under Section 13 and Section 16 (each, a reporting person) generally include both individuals and entities, this legal update focuses on the application of the reporting requirements to investment advisers and broker-dealers (each, a securities firm). This legal update also includes a summary of a related reporting requirement under Section 14A of the Exchange Act and a proposed rule under the Exchange Act that, if adopted, would impose additional reporting requirements, and concludes with a schedule of the filing deadlines under Sections 13 and 16 for 2025. The deadlines for filings under Section 13 were accelerated as of September 30, 2024 pursuant to amendments to modernize beneficial ownership reporting.

Under the Exchange Act, reports made to the U.S. Securities and Exchange Commission (the SEC) are filed on Schedule 13D, Schedule 13G, Form 13F, Form SHO and Form 13H under Section 13, and Form N-PX under Section 14A, each of which is discussed in more detail below. A securities firm (and, in some cases, its parent company and/or other control person(s), and one or more private fund clients of an investment adviser) generally will have a Section 13 or 14A reporting obligation if the firm directly or indirectly:

- beneficially owns, in the aggregate, more than 5% of a class of the voting, equity securities (the Section 13(d) Securities)[1] that are:

  - registered under Section 12 of the Exchange Act,

  - issued by any closed-end investment company registered under the Investment Company Act of 1940, as amended (the Investment Company Act), or

  - issued by any insurance company that would have been required to register its securities under Section 12 of the Exchange Act but for the exemption under Section 12(g)(2)(G) thereof,

  (see *Schedules 13D and 13G: Reporting Significant Beneficial Ownership Positions* below);

- exercises investment discretion over its own accounts[2] and/or the accounts of others that, in the aggregate, hold equity securities trading on a U.S. national securities exchange with an aggregate fair market value of $100 million or more (see *Form 13F: Reporting Equity Positions of Investment Managers with More Than $100 Million in Discretionary Accounts* and *Form N-PX: Reporting Say-on-Pay Proxy Votes by Investment Managers Subject to Form 13F Filings* below),

- exercises investment discretion over its own accounts and/or the accounts of others that, in the aggregate, hold (a) with respect to any equity security that is registered under Section 12 of the Exchange Act or subject to reporting requirements under Section 15(d) of the Exchange Act, a monthly average gross short position equal to $10 million or more in value, or 2.5% or more of the outstanding shares of the issuer, or (b) with respect to any other equity security, a gross short position at the close of regular trading on any settlement date during a calendar month equal to $500,000 in value (see *Form SHO: Reporting Short Sale Positions and Activity by Investment Managers* below); or

- exercises investment discretion over its own accounts and/or the accounts of others that, in the aggregate, purchase or sell any NMS securities (generally U.S. exchange-listed equity securities and standardized options) in an aggregate amount equal to or greater than (a) 2 million shares or shares with a fair market value of over $20 million during a day, or (b) 20 million shares or shares with a fair market value of over $200 million during a calendar month (see *Form 13H: Reporting Identifying and Broker-Dealer Information by Large Traders* below).

Section 16(a) of the Exchange Act requires that directors and officers of a company that has a class of securities registered under Section 12 of the Exchange Act (a public company), as well as persons who beneficially own more than 10% of any class of equity security which is registered under Section 12 of the Exchange Act (other than any exempted security as described below), file reports with the SEC on Forms 3, 4 and 5. Under Section 16(b) of Exchange Act, each of these “insiders” may be liable for any “short-swing profits” (i.e., profits realized from a sale or purchase of the public company’s equity securities made less than six months after a purchase or sale). These obligations are discussed in more detail in *Section 16: Reports of Directors, Officers and Principal Stockholders* below.

SCHEDULES 13D AND 13G: REPORTING SIGNIFICANT BENEFICIAL OWNERSHIP POSITIONS

Sections 13(d) and 13(g) of the Exchange Act require any person or group of persons[3] who directly or indirectly acquires or has beneficial ownership[4] of more than 5% of a class of an issuer’s Section 13(d) Securities (the 5% threshold) to report such beneficial ownership on Schedule 13D or Schedule 13G, as appropriate. Under Rule 13d-3, “beneficial ownership” of a security means that a person has or shares the power, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, (a) to vote or direct the voting of a security (voting power), or (b) to dispose of or direct the disposition of a security (investment power).

Both Schedule 13D and Schedule 13G require background information about the reporting persons and the issuer of the reported Section 13(d) Securities, including the name, address, and citizenship or place of organization of each reporting person, the name, address and CUSIP of the issuer, the amount of the securities beneficially owned and aggregate beneficial ownership percentage, and whether voting power and/or investment power is held solely by the reporting persons or shared with others. Reporting persons that must report on Schedule 13D are also required to disclose a significant amount of additional information, including certain disciplinary events, the source and amount of funds or other consideration used to purchase the Section 13(d) Securities, the purpose of the acquisition, any plans to change or influence the control of the issuer, any contracts or understandings with any person with respect to the Section 13(d) Securities, and a list of any transactions in the securities effected in the last 60 days. A reporting person may use the less burdensome Schedule 13G if it is an Exempt Investor, a Qualified Institution or a Passive Investor (each as defined below).

In determining whether a securities firm has crossed the 5% threshold with respect to a class of an issuer's Section 13(d) Securities,[5] it must include the positions held in any proprietary accounts and the positions held in all discretionary client accounts that it manages (including any private or registered funds, advised or sub-advised accounts, accounts managed for principals and employees, and accounts managed for no compensation). Control persons of a securities firm (which may include certain officers and directors), in determining their beneficial ownership of a class of an issuer's Section 13(d) Securities, would include all of the foregoing positions, plus positions held in any accounts managed by any such control person for themselves or their family (such as IRAs, family companies and most trust accounts).

In general, Schedule 13G is available to any reporting person that falls within one of the following three categories:

Exempt Investors. A reporting person is an Exempt Investor and eligible to file reports on Schedule 13G if the reporting person beneficially owns more than 5% of a class of an issuer's Section 13(d) Securities at the end of a calendar quarter, but its acquisition of the securities is exempt under Section 13(d)(6)(A) or (B) of the Exchange Act or otherwise not required to be reported on Schedule 13D.[6] The SEC staff has applied the exemption under Section 13(d)(6)(A) very narrowly to an issuer that acquires equity securities in a registered stock-for-stock exchange, such as in connection with a merger where the shares of the target company will be merged out of existence.[7] The exemption under Section 13(d)(6)(B) covers a person that acquired more than 5% of a class of an issuer's equity securities prior to the issuer's registration of such securities under the Exchange Act, and thereafter has acquired no more than 2% of the issuer's outstanding shares during the preceding 12 months. An acquisition not otherwise required to be reported on a Schedule 13D includes where a person (other than an officer or director of the issuer) holds a 5% beneficial ownership position in a class of an issuer's Section 13(d) Securities due to their receipt of securities in a spin-off transaction or a reduction in the issuer's outstanding shares.[8]

Qualified Institutions. Along with certain other institutions listed under the Exchange Act,[9] a reporting person that is a registered investment adviser or broker-dealer may file a Schedule 13G as a Qualified Institution if it (a) acquired its position in a class of an issuer's Section 13(d) Securities in the ordinary course of its business, (b) did not acquire such securities with the purpose or effect of changing or influencing control of the issuer, nor in connection with any transaction with such purpose or effect (such purpose or effect, an activist intent), and (c) promptly notifies any discretionary account owner on whose behalf the firm holds more than 5% of the Section 13(d) Securities of such account owner's potential reporting obligation.

Passive Investors. A reporting person is a Passive Investor if it beneficially owns more than 5% but less than 20% of a class of an issuer's Section 13(d) Securities and (a) the securities were not acquired or held with an activist intent, or in connection with any transaction with an activist intent, and (b) the reporting person is not reporting as a Qualified Institution. There is no requirement that a Passive Investor limit its acquisition of Section 13(d) Securities to purchases made in the ordinary course of its business. In addition, a Passive Investor does not have an obligation to notify discretionary account owners on whose behalf the firm holds more than 5% of such Section 13(d) Securities of such account owner's potential reporting obligation.

A securities firm that has one of its principals or employees serving on an issuer's board of directors or management team may not be eligible to qualify as a Qualified Institution or a Passive Investor with respect to such issuer. Even though the securities firm may not otherwise have an activist intent, the staff of the SEC has stated "the fact that officers and directors have the ability to directly or indirectly influence the management and policies of an issuer will generally render officers and directors unable to certify to the requirements" necessary to file as a Qualified Institution or Passive Investor.[10]

Reporting Obligations of Control Persons and Clients

The Firm's Obligations. As discussed above, a securities firm is deemed to be the beneficial owner of Section 13(d) Securities in all accounts over which it exercises voting power and/or investment power. Therefore, a firm will be a reporting person if it directly or indirectly acquires or has beneficial ownership of more than 5% of a class of an issuer's Section 13(d) Securities for its own account(s) or any discretionary client account(s). Unless a securities firm has an activist intent with respect to the issuer of the Section 13(d) Securities, the firm generally will be able to report on Schedule 13G either as a Qualified Institution or as a Passive Investor.

Obligations of a Firm's Control Persons. Any control person (as defined below) of a securities firm, by virtue of its ability to direct the voting and/or investment power exercised by the firm, may be considered an indirect beneficial owner of the Section 13(d) Securities. Consequently, the direct or indirect control persons of a securities firm may also be reporting persons with respect to a class of an issuer's Section 13(d) Securities. The following persons are likely to be considered control persons of a firm:

- any general partner, managing member, trustee, or controlling shareholder of the firm; and

- the direct or indirect parent company of the firm and any other person that indirectly controls the firm (e.g., a general partner, managing member, trustee, or controlling shareholder of the direct or indirect parent company).

If a securities firm (or parent company) is directly or indirectly owned by two partners, members, trustees or shareholders, generally each such partner, member, trustee or shareholder is deemed to be a control person. For example, if a private fund that beneficially owns more than 5% of a class of an issuer's Section 13(d) Securities is managed by a securities firm that is a limited partnership, the general partner of which is an LLC that in turn is owned in roughly equal proportions by two managing members, then each of the private fund, the securities firm, the firm's general partner, and the two managing members of the general partner likely will have an independent Section 13 reporting obligation.

In a 1987 SEC no-action letter, the SEC staff took the position that where investment decisions by an employee benefit plan trust required the approval of three out of five trustees, none of the trustees was the beneficial owner of the trust's portfolio securities for purposes of Section 13(d) of the Exchange Act. This no-action letter has given rise to what practitioners refer to as the "rule of three," which provides that, where voting and investment decisions regarding an entity's portfolio are made by three or more persons and a majority of those persons must agree with respect to voting and investment decisions, then none of those persons individually has voting or dispositive power over the securities in the entity's portfolio and, thus, none of those persons will be deemed to have beneficial ownership over those securities.[11] While the "rule of three" is frequently relied on by practitioners and has been acknowledged by the SEC staff, it has never been formally approved by the SEC.

The determination of who the control persons of a securities firm are for purposes of Section 13 reporting is very fact specific and also may have important ramifications with respect to such control person's obligations and liabilities under Section 16 of the Exchange Act, particularly relating to insider reporting and short-swing profits. Please contact us if you would like further guidance in determining who may constitute a "control person" of your firm for these purposes.

Availability of Filing on Schedule 13G by Control Persons. Any direct and indirect control person of a securities firm may file a Schedule 13G as an Exempt Investor, a Qualified Institution or as a Passive Investor to the same extent as any other reporting person as described above. In order for a control person to file a Schedule 13G as a Qualified Institution, however, no more than 1% of a class of an issuer's Section 13(d) Securities may be held (a) directly by the control person or (b) directly or indirectly by any of its subsidiaries or affiliates <u>that are not Qualified Institutions</u>. For example, a direct or indirect control person of a securities firm will not qualify as a Qualified Institution if more than 1% of a class of an issuer's

Section 13(d) Securities is held by a private fund managed by the firm or other affiliate because a private fund is not among the institutions listed as a Qualified Institution under the Exchange Act.

Obligations of a Firm's Clients. If a client of a securities firm (including a private or registered fund or a separate account client) by itself beneficially owns more than 5% of a class of an issuer's Section 13(d) Securities, the client has its own independent Section 13 reporting obligation. A client's delegation of its voting power and investment power to a securities firm may or may not effectively divest the client of beneficial ownership for purposes of Section 13(d) of the Exchange Act.[12]

Availability of Joint Filings by Reporting Persons. As discussed above, each reporting person has an independent reporting obligation under Section 13 of the Exchange Act. The direct and indirect beneficial owners of the same Section 13(d) Securities may satisfy their reporting obligations by making a joint Schedule 13D or Schedule 13G filing, provided that:

- each reporting person is eligible to file on the Schedule used to make the Section 13 report (e.g., each person filing on a Schedule 13G is a Qualified Institution, Exempt Investor, or Passive Investor);
- each reporting person is responsible for the timely filing of the Schedule 13D or Schedule 13G and for the completeness and accuracy of its own information in such filing;[13] and
- the Schedule 13D or Schedule 13G filed with the SEC (a) contains all of the required information with respect to each reporting person; (b) is signed by each reporting person in his, her, or its individual capacity (including through a power of attorney); and (c) has a joint filing agreement attached.[14]

Filing of Schedule 13D vs. Schedule 13G

Initial filings. A reporting person who is not eligible to use Schedule 13G must file a Schedule 13D within 5 business days of such reporting person's direct or indirect acquisition of beneficial ownership of more than 5% of a class of an issuer's Section 13(d) Securities.

A reporting person that is an Exempt Investor is required to file its initial Schedule 13G within 45 days of the end of the calendar quarter in which the person exceeds the 5% threshold.

A reporting person that is a Qualified Institution also is required to file its initial Schedule 13G within 45 days of the end of the calendar quarter in which the person exceeds the 5% threshold. Since the 5% threshold for a Qualified Institution is calculated as of the end of a calendar quarter, a Qualified Institution that acquires directly or indirectly more than 5% of a class of an issuer's Section 13(d) Securities mid-quarter, but before the end of such calendar quarter has reduced its interest below the 5% threshold, will not be required to file an initial Schedule 13G. However, a Qualified Institution that acquires direct or indirect beneficial ownership of more than 10% of a class of an issuer's Section 13(d) Securities prior to the end of a calendar quarter must file an initial Schedule 13G within 5 business days after the first month in which the person exceeds the 10% threshold.

A reporting person that is a Passive Investor must file its initial Schedule 13G within 5 business days of the date on which it exceeds the 5% threshold.

Switching from Schedule 13G to Schedule 13D. If a reporting person that previously filed a Schedule 13G no longer satisfies the conditions to be an Exempt Investor, Qualified Institution, or Passive Investor, the person must switch to reporting its beneficial ownership of a class of an issuer's Section 13(d) Securities on a Schedule 13D (assuming that the person continues to exceed the 5% threshold). This could occur in the case of (a) a reporting person that changes from acquiring or holding Section 13(d) Securities for passive investment to acquiring or holding such securities with an activist intent, (b) a reporting person that is a Qualified Institution that deregisters as an investment adviser pursuant to an exemption under the Investment Advisers Act of 1940, as amended, or applicable state law, or (c) a reporting person that is a Passive Investor that acquires 20% or more of a class of an issuer's Section 13(d) Securities. In each case, the reporting person must file a Schedule 13D within 5 business days of the event that caused it to no longer satisfy the necessary conditions (except that, if a former Qualified Institution is able to qualify as a Passive Investor, such person may simply amend its Schedule 13G within 5 business days to switch its status).

A reporting person that is required to switch to reporting on a Schedule 13D will be subject to a "cooling off" period from the date of the event giving rise to a Schedule 13D obligation (such as the change to an activist intent or acquiring 20% or more of a class of an issuer's Section 13(d) Securities) until 10 calendar days after the filing of the Schedule 13D. During the "cooling off" period, the reporting person may not vote or direct the voting of the Section 13(d) Securities or acquire additional beneficial ownership of such securities. Consequently, a person should file a Schedule 13D as soon as possible once it is obligated to switch from a Schedule 13G to reduce the duration of the "cooling off" period.

The former Schedule 13G reporting person will thereafter be subject to the Schedule 13D reporting requirements with respect to the Section 13(d) Securities until such time as the reporting person once again qualifies as a Qualified Institution or Passive Investor with respect to the Section 13(d) Securities or has reduced its beneficial ownership interest below the 5% threshold. However, only a reporting person that was originally eligible to file a Schedule 13G and was later required to file a Schedule 13D may switch back to reporting on Schedule 13G.[15]

Amendments to Schedule 13D. If there has been any material change to the information in a Schedule 13D previously filed by a reporting person,[16] the person must file an amendment to such Schedule 13D within <u>2 business days</u> after the date of such material change. A material change includes, without limitation, a reporting person's acquisition or disposition of 1% or more of a class of the issuer's Section 13(d) Securities, including as a result of an issuer's repurchase of its securities. An acquisition or disposition of less than 1% may be considered a material change depending on the circumstances. A disposition that reduces a reporting person's beneficial ownership interest below the 5% threshold, but is less than a 1% reduction, is not necessarily a material change that triggers an amendment to Schedule 13D. However, we suggest an amendment in such a circumstance to eliminate the reporting person's filing obligations if the reporting person does not in the near term expect to increase its ownership once more above 5%.

Amendments to Schedule 13G.

- *Quarterly*. For a reporting person that has previously filed a Schedule 13G, if there has been any material change to the information reported in such Schedule 13G as of the end of a calendar quarter, then an amendment to such Schedule 13G must be filed within 45 days of that calendar quarter. A reporting person is not required to make a quarterly amendment to Schedule 13G if there has been no material change since the previously filed Schedule 13G or if the only change results from a change in the person's ownership percentage as a result of a change in the aggregate number of Section 13(d) Securities outstanding (e.g., due to an issuer's repurchase of its securities).

- *Other than Quarterly (Qualified Institutions)*. A reporting person that previously filed a Schedule 13G as a Qualified Institution reporting beneficial ownership of less than 10% of a class of an issuer's Section 13(d) Securities, must file an amendment to its Schedule 13G within 5 business days of the end of the first month in which such Qualified Institution is the direct or indirect beneficial owner of more than 10% of a class of the issuer's Section 13(d) Securities. Thereafter, the reporting person must file an amendment to Schedule 13G within 5 business days after the end of any month in which its direct or indirect beneficial ownership of such securities increases or decreases by more than 5% of the class of securities (computed as of the end of the month).[17]

- *Other than Quarterly (Passive Investors)*. A reporting person that previously filed a Schedule 13G as a Passive Investor must file an amendment within 2 business days after it directly or indirectly acquires more than 10% of a class of an issuer's Section 13(d) Securities. Thereafter, the reporting person must file an amendment to Schedule 13G within 2 business days after its direct or indirect beneficial ownership of such securities increases or decreases by more than 5%.

There is currently no filing fee for Schedule 13G or Schedule 13D.

Disclaimer of Beneficial Ownership

In certain circumstances, it may be appropriate for the Schedule 13D or Schedule 13G made by control persons or other indirect beneficial owners to include a disclaimer of beneficial ownership of some or all of the reported Section 13(d) securities. This disclaimer is typically inserted as a footnote to the ownership information on the cover page and in the body of the Schedule. Please contact us if you have any questions about including such a disclaimer.

Recent Enforcement Trends in Section 13 Reports

In September 2024, the SEC announced settlements of enforcement actions against 23 reporting persons for failing to timely report their beneficial ownership. The charges ranged from one-off filings that were late by a few weeks or months, to years of repeatedly late or missed filings. This represented a significantly more aggressive approach to enforcing violations of beneficial ownership reporting requirements under Section 13 of the Exchange Act compared to the SEC's previous enforcement initiative in September 2023, which resulted in settled enforcement actions against only six reporting persons for repeatedly late or missed filings. This trend may reverse under the current administration given its shift in priorities and stance on aggressive regulatory enforcement.

FORM 13F: REPORTING EQUITY POSITIONS OF INVESTMENT MANAGERS WITH MORE THAN $100 MILLION IN DISCRETIONARY ACCOUNTS

Rule 13f-1 under the Exchange Act requires that a report on Form 13F be filed with the SEC by every so-called institutional investment manager[18] that exercises investment discretion[19] over one or more accounts holding equity securities that (a) are admitted for trading on a national securities exchange (the Section 13(f) Securities),[20] and (b) have an aggregate fair market value as of the last trading day of any month during a calendar year equal to at least $100 million (the $100 million threshold). Form 13F requires an institutional investment manager that meets the $100 million threshold (a reporting manager) to report the amount and value of the Section 13(f) Securities held in its discretionary accounts in the aggregate and on an issuer-by-issuer basis.[21] A reporting manager must file Form 13F (i) within 45 days after the last day of each calendar year in which it meets the $100 million threshold, and (ii) within 45 days after the last day of each of the first three calendar quarters of the following calendar year. The three quarterly filings are required even if the aggregate fair market value of the Section 13(f) Securities held in a reporting manager's discretionary accounts falls below the $100 million threshold during the calendar year. Accordingly, once an institutional investment manager's obligation to report on Form 13F is established, the manager must make four quarterly filings with the SEC.

Under certain circumstances, a reporting manager can request confidential treatment of the information contained in the Form 13F filing. Please contact us if you require any assistance in seeking confidential treatment of your Form 13F filing.

Reporting of Shared Investment Discretion

When two or more reporting managers share investment discretion over the same Section 13(f) Security (for example, as a result of a sub-advisory arrangement or a direct or indirect "control" relationship), each manager has an independent reporting obligation under Rule 13f-1 with respect to that security. In order to avoid duplicative reporting of the same Section 13(f) Security, the reporting managers must arrange to file one of the three different types of Form 13F. These three types of Form 13F are:

- 13F Holdings Report, on which a reporting manager includes all Section 13(f) Securities over which it or any other reporting manager exercises investment discretion;
- 13F Notice, on which a reporting manager indicates that all Section 13(f) Securities over which it exercises investment discretion are reported on a Form 13F filed by another reporting manager; and
- 13F Combination Report, on which a reporting manager includes some, but not all, of the Section 13(f) Securities over which it exercises investment discretion, and indicates that the remaining securities are reported on a Form 13F filed by another reporting manager.

Any reporting manager that files a 13F Notice or 13F Combination Report must identify each other reporting manager that is responsible for a Form 13F filing that reports any Section 13(f) Securities over which such reporting manager shares investment discretion.

Reporting Obligations of Control Persons and Clients

Any control persons that make decisions as to how a reporting manager exercises its investment discretion with respect to the Section 13(f) Securities in its accounts may also have reporting obligations under Rule 13f-1 depending on the facts and circumstances. In that case, each control person would file a 13F Notice as described above.

A discretionary client of an institutional investment manager generally will not have a reporting obligation under Rule 13f-1 even if it holds $100 million or more in Section 13(f) Securities since the obligation is tied to the exercise of investment discretion. However, it is possible that a reporting obligation may arise if a client itself actually engages in the investment decision-making process (such as through a fund client's internal investment committee whose decisions bind the institutional investment manager).

FORM SHO: REPORTING SHORT SALE POSITIONS AND ACTIVITY BY INVESTMENT MANAGERS

Rule 13f-2 under the Exchange Act requires that a report on Form SHO be filed with the SEC by any institutional investment manager (irrespective of its assets under management) which exercises investment discretion over one or more accounts that have (a) with respect to the equity securities of any public company or any company subject to the reporting requirements under Section 15(d) of the Exchange Act (a reporting company), a monthly average gross short position at the close of regular trading hours equal to at least $10 million in value[22] or at least 2.5% of the public company's outstanding shares,[23] and (b) with respect to the equity securities of any non-public and non-reporting company (including equity securities that are privately held, traded over-the-counter or listed on non-U.S. exchanges), a gross short position with a value of at least $500,000 at the close of regular trading hours on any settlement date during a calendar month.[24] The monthly reports, due within 14 days after the end of each calendar month commencing on February 14, 2025, disclose detailed information about the institutional investment manager's gross short position on an issuer-by-issuer basis, and the daily net change in the gross short position with respect to the equity securities of each issuer as of each settlement date during the month due to any transactions that increased or decreased that gross short position during the calendar month.[25]

If two or more institutional investment managers share investment discretion over the same equity security, only one of the managers must file Form SHO. An institutional investment manager may list on the cover page of a Form SHO filing whether any other manager is reporting all or some of the gross short position information with respect to the reporting manager.

While Form SHO filings with the SEC are confidential, the SEC plans to publish aggregated data regarding short sale activity within one month following the end of each reporting month, with the first report being published three months after institutional investment managers are required to begin filing Form SHO. The aggregated information will be reported for each issuer and include the aggregate gross short position at the end of each reporting month and daily net change for each settlement date during the reporting month.

There is currently ongoing litigation challenging the potential conflicts between the short sale reporting obligations under Rule 13f-2 and the securities lending reporting obligations under Rule 10c-1a under the Exchange Act. We will keep clients updated on developments in this case, but clients should continue to comply with the rule regardless of potential legal outcomes.

FORM 13H: REPORTING IDENTIFYING AND BROKER-DEALER INFORMATION BY LARGE TRADERS

Rule 13h-1 under the Exchange Act requires a Form 13H to be filed with the SEC by any individual or entity (each, a Large Trader) that, directly or indirectly, exercises investment discretion over one or more accounts and effects transactions in NMS Securities (as defined below) for those accounts through one or more registered broker-dealers that, in the aggregate, equal or exceed (a) 2 million shares or $20 million in fair market value during any calendar day, or (b) 20 million shares or $200 million in fair market value during any calendar month (each, an identifying activity level). Under Regulation NMS, an NMS Security is defined to include any U.S. exchange-listed equity securities and any standardized options, but does not include any exchange-listed debt securities, securities futures, or shares of open-end mutual funds that are not currently reported pursuant to an effective transaction reporting plan under the Exchange Act.

A Large Trader must file an initial Form 13H promptly after effecting aggregate transactions equal to or greater than one of the identifying activity levels. The SEC has indicated that filing within 10 days will be deemed a prompt filing. Amendments to Form 13H must be filed (a) annually within 45 days after the end of each full calendar year so long as a securities firm continues to qualify as a Large Trader and (b) promptly following the end of a calendar quarter if any of the information on the most recent Form 13H becomes inaccurate. The reporting obligations of a Large Trader continue until it files an amendment to Form 13H showing that it has ceased operations (a "terminating" filing) or has not effected transactions in NMS Securities at or above the identifying activity level for a full calendar year (an "inactive status" filing).

Form 13H requires that a Large Trader, reporting for itself and for any affiliate that exercises investment discretion over NMS securities, list the broker-dealers at which the Large Trader and its affiliates have accounts and designate each broker-dealer as a "prime broker," an "executing broker," and/or a "clearing broker." Form 13H filings with the SEC are confidential and exempt from disclosure under the United States Freedom of Information Act. The information is, however, subject to disclosure to Congress and other federal agencies and when ordered by a court.

If a securities firm has multiple affiliates in its organization that qualify as Large Traders, Rule 13h-1 permits the Large Traders to delegate their reporting obligation to a control person that would file a consolidated Form 13H for all of the Large Traders it controls. Otherwise, each Large Trader in the organization will be required to file a separate Form 13H.

FORM N-PX: REPORTING SAY-ON-PAY PROXY VOTES BY INVESTMENT MANAGERS SUBJECT TO FORM 13F FILINGS

Rule 14Ad-1 under the Exchange Act requires that a report on Form N-PX be filed with the SEC on an annual basis by any reporting manager subject to Form 13F filings which exercises voting power[26] with respect to the securities of any public company subject to the proxy solicitation rules under Section 14A of the Exchange Act.[27] The annual report includes information about the voting decisions of the reporting manager with respect to any shareholder advisory votes to approve (a) the compensation paid to the public company's executives, (b) the frequency of the executive compensation approval votes, and (c) any so-called "golden parachute" arrangements in connection with a merger or acquisition (collectively, "say-on-pay votes" or "say-on-pay voting matter").

On Form N-PX, reporting managers must identify the say-on-pay voting matters, if any, at each shareholder meeting during the reporting period using the same language and order of priority as disclosed in the public company's form of SEC proxy card, if any, for such meeting and disclose (a) the number of securities voted (or instructed to be voted) by the reporting manager, (b) how those shares were voted (i.e., for, against or abstain), (c) the number of securities loaned, directly or indirectly, by the reporting manager that were not recalled to vote, and (d) whether the votes were for or against the recommendation of the public company's management.

A securities firm that becomes a reporting manager will file its initial Form N-PX as of August 31 of the calendar year following the date of its initial Form 13F, and disclose its say-on-pay proxy votes for the 12-month period ending June 30 of such calendar year (e.g., if the reporting manager's initial Form 13F is due on February 15, 2025, then the initial Form N-PX will be due by August 31, 2026 and disclose any say-on-pay votes during the period from July 1, 2025 to June 30, 2026). An annual Form N-PX filing will be due by August 31 of each year thereafter to report the say-on-pay votes, if any, by the reporting manager during the most recent 12-month period ended June 30. Once a securities firm ceases to be a reporting manager under Section 13(f) of the Exchange Act, it will be required to file a final Form N-PX as of March 1 of the calendar year following the date of its final Form 13F filing, and disclose its say-on-pay proxy votes the three-month period ending September 30 of such calendar year (e.g., if the reporting manager's final Form 13F is due on November 14, 2025, then the final Form N-PX will be due by March 1, 2026 and disclose any say-on-pay votes during the period from July 1, 2025 to September 30, 2025).

A reporting manager can request confidential treatment of the information contained in a Form N-PX filing under circumstances consistent with the standard for confidential treatment requests under Section 13(f) of the Exchange Act. Please contact us if you require any assistance in seeking confidential treatment of your Form N-PX filing.

Reporting of Shared Voting Power

In order to avoid duplicative reporting of the same proxy votes, reporting managers that share voting power over any public company's equity securities must arrange to file one of the three different types of Form N-PX. These three types of Form N-PX are:

- Institutional Manager Voting Report, on which a reporting manager includes the say-on-pay proxy votes for which it and any other reporting manager exercised voting power;
- Institutional Manager Notice Report, on which a reporting manager indicates that (a) all of the say-on-pay proxy votes for which it exercised voting power are reported on a Form N-PX filed by another reporting manager, (b) the reporting manager has a disclosed policy of not voting proxies, or (c) the reporting manager did not exercise its voting power on any say-on-pay voting matter during the reporting period; and
- Institutional Manager Combination Report, on which a reporting manager includes some, but not all, of the say-on-pay votes for which it exercised voting power, and indicates that the remaining securities are reported on a Form N-PX filed by another reporting manager.

Any reporting manager that files an Institutional Manager Notice Report or Institutional Manager Combination Report must identify each other reporting manager that is responsible for the Form N-PX filing which reports any say-on-pay votes for which such reporting manager shares voting power.

Using the EDGAR Filing System

You may file electronically on EDGAR yourself or have an outside vendor, such as a financial printer, do so on your behalf. Because EDGAR submissions require the use of specialized software, we do not recommend that you make EDGAR filings yourself unless you fully understand the process. Instead, we recommend that you make EDGAR filings through an outside vendor. Paul Hastings has an arrangement with outside vendors to make EDGAR filings for our clients, and would be willing to do so as requested. The vendors engaged by Paul Hastings charge a service fee for preparing and submitting each filing. We can also provide the names of additional vendors for your consideration. Whether you use an outside vendor or you make your EDGAR filings yourself, you must first obtain several different identification codes from the SEC before the filings can be submitted. In order to receive your filing codes, you first submit a Form ID to the SEC for each reporting person. The Form ID must be signed, notarized, and submitted electronically through the SEC's Filer Management website, which can be accessed at https://www.filermanagement.edgarfiling.sec.gov. You are required to retain a manually signed hard copy of all EDGAR filings (and related documents like powers of attorney) in your records available for SEC inspection for a period of five years after the date of filing.

SECTION 16: REPORTS OF DIRECTORS, OFFICERS AND PRINCIPAL SHAREHOLDERS

Purpose and Background of Section 16

Section 16 of the Exchange Act and the rules thereunder impose certain obligations on insiders of any public company. For purposes of Section 16, an insider is (a) a director of the public company, (b) a designated officer of the public company,[28] or (c) a person who beneficially owns[29] more than 10% of any class of equity security (other than an exempted security) which is registered under Section 12 of the Exchange Act (a 10% beneficial owner).

Section 16 requires insiders of a public company to report their direct and indirect ownership of the company's equity securities and any transactions in such securities, and to disgorge any "short-swing profits," which are discussed below.[30] These requirements seek to discourage insiders from profiting on the basis of the superior information that may be accessible to them because of their influential role in the public company. Disgorgement applies on "strict liability" basis even if an insider can show that his, her, or its trades were not made using any inside information.

Insiders: Officers, Directors and 10% Beneficial Owners

Section 16 requirements apply to the directors and designated officers of a public company, even if such persons do not own any securities of the company. While a person's title is generally indicative, the final determination of whether a person is a director or designated officer of a public company for Section 16 purposes depends on the facts and circumstances, primarily based on the person's function and influence at the public company. In addition, a securities firm that has a principal or employee on the board of directors of a public company may be deemed to be a "director by deputization" for Section 16 purposes. While not set out in Section 16 or the rules thereunder, the concept of deputization has been found by the courts where a securities firm is acting as a director of a public company through its deputy and (a) the director shares confidential information with the firm, (b) the director influences the firm's investment decisions with respect to the public company, or (c) the director's actions as a director are influenced by the firm.

Section 16 requirements also apply to all 10% beneficial owners. In calculating whether a securities firm beneficially owns more than 10% of a public company's equity securities, a firm that is a Qualified Institution[31] can exclude any equity securities held for the benefit of any third party or in any customer or fiduciary accounts in the ordinary course of business as long as the equity securities were not acquired with an activist intent.[32] Equity securities not held in a Qualified Institution's fiduciary capacity or which were acquired with an activist intent are attributable to the Qualified Institution and will be counted to determine whether it is a 10% beneficial owner.

Profit Interest Is Reported Under Section 16

Insiders of a public company are required to report their beneficial ownership of the company's equity securities and any transactions involving the equity securities. Unlike the definition of "beneficial ownership" for the purpose of determining whether a person is a 10% beneficial owner discussed above (i.e., voting and dispositive power), for Section 16 reporting purposes, an insider's "beneficial ownership" depends on whether the person has the opportunity to profit, directly or indirectly, from a purchase, sale or other transaction in the public company's equity securities (a profit interest). A profit interest may exist as the result of any contract, arrangement, understanding, or relationship that the insider may have with another person or organization. Examples of an indirect profit interest in a public company's equity securities that will trigger an insider's Section 16 reporting requirement include: (a) the equity securities held by family members in the same household as the insider, (b) a security-based swap involving the equity securities, (c) the right to acquire equity securities through the exercise or conversion of any other derivative security (whether or not exercisable within 60 days), (d) a general partner's proportionate interest in the equity securities held by a partnership, and (e) under certain circumstances, receipt of a performance-based fee or allocation from a client with respect to equity securities held in the client's portfolio.[33]

Reporting Requirement under Section 16

The reports that an insider will file with the SEC[34] under Section 16 are:

Form 3 – Initial Statement of Beneficial Ownership of Securities. Form 3 must be filed within 10 days of any individual or entity first becoming an insider. Form 3 includes the details of any equity securities of the public company that the insider beneficially owns at the time of becoming an insider. Any subsequent changes to an insider's position must be disclosed on Form 4 or Form 5.

Form 4 – Statement of Changes of Beneficial Ownership of Securities. An insider must report on Form 4 any change that occurs with respect to its beneficial ownership interest in the public company's equity securities. Such a change may occur as a result of, among other transactions: (a) any open market or private purchase or sale, or bona fide gift of any equity or convertible securities; (b) a stock option grant or forfeiture; (c) the conversion of a derivative security; (d) the acquisition or vesting of any restricted stock or restricted stock unit; (e) a merger, exchange offer, or a tender offer; and (f) any purchase, sale or exercise of any option, warrant, or right. Limited exemptions exist for transactions that do not need to be reported on Form 4, including the acquisition of a portfolio company's equity securities not exceeding $10,000, subject to specified conditions (the Small Acquisitions Exemption).[35] Any Form 4 must be filed with the SEC before 10:00 p.m. Eastern Time on the second business day following the day on which the triggering transaction was executed or otherwise deemed to occur (except where the SEC has determined by rule that the two-day period is not feasible).[36]

Form 5 – Annual Statement of Beneficial Ownership of Securities. An insider must file a Form 5 to report any equity securities and transactions that were not previously reported on a Form 3, 4 or 5. These include securities and transactions that should have been reported during the year but were not and certain transactions that were not required to be reported on Form 4, such as the acquisition of securities pursuant to the Small Acquisitions Exemption. Form 5 must be filed no later than 45 days after the end of the public company's fiscal year. In lieu of using Form 5, an insider may choose to report a transaction on Form 4; however, the voluntary Form 4 must be timely filed before the end of the second business day following the day on which the transaction that triggered the filing has been executed or otherwise deemed to occur.

Filing Forms 3, 4 and 5 Using EDGAR

Filings on Forms 3, 4 and 5 must be submitted to the SEC via EDGAR (unless a hardship exemption of the type specified in Regulation S-T applies).[37]

Short-Swing Profits

An insider is prohibited from earning "short-swing profits" on the equity securities (including derivative equity securities) of a public company or any security-based swap involving the public company's equity securities (the covered securities). "Short-swing profits" may result whenever an insider (a) sells (or is deemed to sell) any covered securities within six months of purchasing any covered securities of the same class at a lower price per share, or (b) purchases (or is deemed to purchase) any covered securities within six months of selling any covered securities of the same class at a higher price per share. While an insider is not restricted under Section 16 from purchasing and selling, or selling and purchasing, covered securities within a six-month period, realizing "short-swing profits" from these transactions is a violation of Section 16. The violation is not regarded as a criminal offense, but the liability is strict, which means that an insider may not offer any defenses (reasonable or otherwise) to avoid disgorgement. In calculating the amount of the disgorgement, an insider is required to pay the excess of (a) the highest sales price per share, over (b) the lowest purchase price per share, with respect to the covered securities involved in the matching transactions made within the six-month period. In addition, the rules adopted under Section 16(b) provide for the matching of purchases and sales of derivative securities with purchases and sales of the securities underlying those derivative securities for the purpose of determining the "profits" that may be disgorged under Section 16(b). For example, the sale of a warrant to purchase common stock of a public company would be matched with any purchase of the common stock of that public company occurring within six months for purposes of determining "short-swing profits" under Section 16(b). To avoid a "short-swing profits" violation, before entering into a transaction involving any covered securities (including any exercise of a derivative security), an insider should look back six months to determine if any prior sale or purchase can be matched with the proposed transaction and would result in the realization of any profit.

Prohibition on Short-Sales

Section 16(c) of the Exchange Act prohibits an insider from engaging in short-sale transactions in covered securities, except that an insider may make "short sales-against-the-box" if they are made in accordance with Section 16(c). Any short sale that takes place, whether prohibited or not, is subject to matching under Section 16(b) with purchases occurring within less than six months.

PROPOSED REPORTING OF SECURITIES-BASED SWAPS

The SEC proposed Rule 10B-1 under the Exchange Act[38] in December 2021 that, if adopted, would require any person with large notional positions[39] in credit default swaps, other swaps based on debt securities, or swaps based on equity securities to file reports with the SEC that disclosed each security-based swap position and any related position in the reference debt or equity security, loan or narrow-based security index underlying the security-based swap. The initial report would be due within 1 business day of exceeding the notional threshold and an amendment would be due within 1 business day following any material change to the information in a previously filed report (including a change equal to 10% or more of a security-based swap position). The SEC reopened the proposed rule's comment period in June 2023 and included it in their regulatory agenda for Fall 2024, but no further actions have been taken to finalize the proposed rule.

2025 FILING SCHEDULE

TYPE OF SECTION 13 FILING	*TRIGGERING EVENTS*	*FREQUENCY OF FILING*	*FILING DEADLINE (a Business Day is any day other than a weekend or U.S. federal holiday; if deadline falls on a weekend or U.S. federal holiday, the deadline is extended to the next Business Day)*
Initial Schedule 13D	When a reporting person is not qualified to file a Schedule 13G and exceeds the 5% threshold	One-time	Within 5 Business Days after 5% threshold exceeded
Initial Schedule 13G	1. When a Qualified Institution or Exempt Investor exceeds the 5% threshold (subject to item 2 below)	One-time	Within 45 days after the end of the calendar quarter which the 5% threshold exceeded
	2. When beneficial ownership of a Qualified Institution with no previous Section 13 filing exceeds 10% at any month end	One-time	Within 5 Business Days after the end of the month in which the 10% threshold is exceeded
	3. When a Passive Investor exceeds the 5% threshold	One-time	Within 5 Business Days after the 5% threshold is exceeded
Switch from Schedule 13G to Schedule 13D	When a reporting person acquires or holds Section 13(d) Securities with an "activist intent"	One-time	Within 5 Business Days of having the "activist intent"
	When a Passive Investor's beneficial ownership equals or exceeds 20%	One-time	Within 5 Business Days of acquiring 20% beneficial ownership
Amendments to Schedule 13D	Any material change in information reported on previous Schedule 13D	Ongoing	Within **2 Business Days** after the material change
Amendments to Schedule 13G	*All Reporting Persons*:		
	Any material change in information reported on Schedule 13G	Quarterly	Within 45 days after the end of each calendar quarter (i.e., February 14, 2025, May 15, 2025, August 14, 2025, and November 14, 2025)

TYPE OF SECTION 13 FILING	*TRIGGERING EVENTS*	*FREQUENCY OF FILING*	*FILING DEADLINE (a Business Day is any day other than a weekend or U.S. federal holiday; if deadline falls on a weekend or U.S. federal holiday, the deadline is extended to the next Business Day)*
	Qualified Institutions:		
	1. When beneficial ownership of a Qualified Institution exceeds 10% at end of a month	Ongoing	Within 5 Business Days after the end of the month in which the 10% threshold is exceeded
	2. Thereafter, when beneficial ownership of a Qualified Institution increases or decreases by 5% or more from the last Schedule 13G filing, computed as of the last day of the month	Ongoing	Within 5 Business Days after the end of the month in which such increase or decrease occurs
	Passive Investors:		
	1. When beneficial ownership of a Passive Investor exceeds 10%	Ongoing	Within **2 Business Days** after the 10% threshold is exceeded
	2. Thereafter, when beneficial ownership of a Passive Investor increases or decreases by 5% or more from the last Schedule 13G filing	Ongoing	Within **2 Business Days** after such increase or decrease
Initial Form 13F	When a reporting person has discretion over accounts with $100 million or more of Section 13(f) Securities on the last trading day of any month during the calendar year	One-time	February 14, 2025
Quarterly Form 13F	After initial Form 13F, filings must continue for at least the next three calendar quarters	Quarterly	May 15, 2025 August 14, 2025 November 14, 2025
Amendment to Form 13F	Any omitted holdings or errors in information reported on previous Form 13F	As needed	Not specified but we recommend promptly

TYPE OF SECTION 13 FILING	*TRIGGERING EVENTS*	*FREQUENCY OF FILING*	*FILING DEADLINE (a Business Day is any day other than a weekend or U.S. federal holiday; if deadline falls on a weekend or U.S. federal holiday, the deadline is extended to the next Business Day)*
Form SHO	When accounts under discretionary management have (a) a monthly average gross short position in the equity securities of any public or reporting company equal to $10 million in value or 2.5% of the company's outstanding shares, or (b) a gross short position in the equity securities of other company of $500,000 at the closing of regular trading hours on any settlement date (each, an "identifying short position")	Monthly	Within 14 days of the end of any calendar month in which the manager has an "identifying short position"
Initial Form 13H	When accounts under discretionary management transact in NMS securities in an amount equal to or more than (a) 2 million shares or $20 million during any calendar day, or (b) 20 million shares or $200 million during any calendar month ("identifying activity level")	One-time	Promptly after effecting aggregate transactions at the "identifying activity level"
Subsequent Form 13H	After the initial Form 13H	Annually	Within 45 days after the end of each full calendar year until the filing of an "inactive status" Form 13H after a full calendar year of effecting transactions below the "identifying activity level"
	Any information on the previous Form 13H becomes inaccurate	Quarterly	Promptly following the end of the calendar quarter in which the information becomes inaccurate
Initial Form N-PX	When a reporting person exercises voting power over any public company's securities with respect to any say-on-pay voting matters	One-time	August 31 after its initial Form 13F filing *(July 1 to June 30 reporting period*)

TYPE OF SECTION 13 FILING	*TRIGGERING EVENTS*	*FREQUENCY OF FILING*	*FILING DEADLINE (a Business Day is any day other than a weekend or U.S. federal holiday; if deadline falls on a weekend or U.S. federal holiday, the deadline is extended to the next Business Day)*
Subsequent Form N-PX	After the initial Form N-PX	Annual	August 31 of each calendar year (*July 1 to June 30 reporting period*)
	When a reporting person ceases to be a Form 13F reporting person	One-time	March 1 after its last Form 13F filing (*July 1 to September 30 reporting period*)
Form 3	When a reporting person becomes an officer or director of a public company or meets the 10% threshold	One-time	Within 10 days of the "triggering" event (or at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement)
Form 4	Any transaction or change in beneficial ownership (e.g., exercise of any option, warrant or right or conversion of a security)	Ongoing	Within **2 Business Days** of the trade date
Form 5	Any transaction not reported on Form 4 during the calendar year (*not required if all transactions previously reported on Form 4*)	Annual	Within 45 days after the end of each full calendar year

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] Importantly, with respect to Section 13(d) Securities, a person is deemed to beneficially own the underlying equity securities if the person has the right to acquire such securities within 60 days of the reporting date, including (a) through the exercise of any option, warrant or right; (b) through the conversion of a security; (c) through the power to revoke a trust, discretionary account, or similar arrangement; or (d) upon the automatic termination of a trust, discretionary account, or similar arrangement. Any person who acquires a derivative security or power specified in clauses (a), (b) and (c) above with the purpose or effect of changing or influencing the control of the issuer, or in connection with any transaction with such purpose or effect, will be deemed to be the beneficial owner of the underlying Section 13(d) Securities immediately upon acquisition and regardless of the timing of the exercise or conversion right.

[2] A natural person who buys and sells securities solely for his or her own account is not subject to Form 13F reporting requirements.

[3] A "group" is defined in Rule 13d-5 as "two or more persons [that] agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer." See, for example, the persons described above in *Reporting Obligations of "Control Persons."* An agreement to act together does not need to be in writing and may be inferred by the SEC or a court from the concerted actions or common objective of the group members.

[4] Under current SEC rules, a person holding securities-based swaps or other derivative contracts may be deemed to beneficially own the underlying Section 13(d) Securities if the swap or derivative contract provides the holder with voting or investment power over the underlying securities. Please contact us if you would like guidance regarding the application of Section 13 to securities-based swaps or other derivative contracts.

[5] In calculating the 5% test, a reporting person is permitted to rely upon the issuer's most recent Form 10-Q, 10-K or 8-K for purposes of determining the amount of the outstanding equity securities of the issuer, unless the person knows or has reason to believe that such information is inaccurate. Additionally, the "outstanding equity securities of the issuer" will also include the equity securities underlying any options, warrants or convertible securities that the reporting person has the right to acquire within 60 days in calculating the 5% test, but excludes the equity securities underlying any options, warrants, or convertible securities held by any other shareholders.

[6] Unlike Qualified Institutions and Passive Investors, an Exempt Investor may have an activist intent without losing its ability to report on Schedule 13G.

[7] See Question 101.05 (September 14, 2009), Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting Compliance and Disclosure Interpretations of the Division of Corporation Finance of the SEC (the Regulation 13D-G C&DIs), available at https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/exchange-act-sections-13d-13g-regulation-13d-g-beneficial-ownership-reporting.

[8] See Question 103.08 and 103.09 (September 14, 2009), Regulation 13D-G C&DIs.

[9] Under Rule 13d-1, a reporting person also qualifies as a Qualified Institution if it is a bank as defined in Section 3(a)(6) of the Exchange Act, an insurance company as defined in Section 3(a)(19) of the Exchange Act, an investment company registered under the Investment Company Act, or an employee benefit plan, savings association, or church plan. The term "Qualified Institution" also includes a non-U.S. institution that is the functional equivalent of any of the foregoing entities and the control persons and parent holding companies of an entity that qualifies as a Qualified Institution.

[10] See Question 103.04 (September 14, 2009), Regulation 13D-G C&DIs.

[11] *Southland Corp.*, SEC No-Action Letter (August 10, 1987).

[12] The SEC staff has issued guidance that a client may not be subject to Section 13(d) of the Exchange Act if it delegates all voting power and investment power to a securities firm in a contract that is terminable on more than 60 days' notice. See Question 105.04 (September 14, 2009), Regulation 13D-G C&DIs. However, the effectiveness of this delegation was called into question in a 2019 decision by a New York district court which ruled that a fund's contractual delegation of voting power and investment power to an affiliated investment adviser did not remove its beneficial ownership under Section 13(d) because the common control person of the entities acted for the fund and could unilaterally terminate the contract at any time. See *Packer ex rel. 1-800-Flowers.com, Inc. v. Raging Capital Mgmt., LLC, 15-CV-5933 (GRB) (E.D.N.Y. Aug. 20, 2019), vacated 981 F.3d 148 (2d Cir. 2020)* (dismissed after appeal in 2023 for lack of standing).

[13] If the reporting persons are eligible to file jointly on Schedule 13G under separate categories (e.g., a private fund as a Passive Investor and its control persons as Qualified Institutions), then the reporting persons must comply with the earliest filing deadlines applicable to the group in filing any joint Schedule 13G. In the example above, the reporting persons would be required to file a Schedule 13G initially within 5 business days of exceeding the 5% threshold and thereafter within 2 business days of any transaction triggering an amendment (i.e., the filing deadlines applicable to a Passive Investor) and not the later deadlines applicable to a Qualified Institution.

[14] We have standard forms of powers of attorney and joint filing agreements for Schedule 13G filings. Please contact us if you need these forms.

[15] See Question 103.07 (September 14, 2009), Regulation 13D-G C&DIs.

[16] This includes a change in the previously reported beneficial ownership percentage of a reporting person even if such change results solely from an increase or decrease in the aggregate number of outstanding securities of the issuer.

[17] A person or entity that beneficially owns more than 10% of a class of Section 13(d) Securities may also have filing or other obligations under the Hart-Scott-Rodino Act and/or Section 16 of the Exchange Act. If your firm beneficially owns more than 10% of a class of Section 13(d) Securities and is not aware of these possible obligations, please contact us.

[18] Section 13(f)(6)(A) of the Exchange Act defines the term "institutional investment manager" to include any person (other than a natural person) investing in, or buying and selling, securities for its own account, and any person (including a natural person) exercising investment discretion with respect to the account of any other person (including any private or registered fund). For example, investment advisers (whether or not they are registered), broker-dealers, banks, trustees, and insurance companies are all institutional investment managers.

[19] For this purpose, an institutional investment manager has "investment discretion" over an account if it directly or indirectly (a) has the power to determine which securities are bought or sold for the account, or (b) makes decisions about which securities are bought or sold for the account, even though someone else is responsible for the investment decisions.

[20] The SEC publishes a complete list of Section 13(f) Securities on its official website each quarter, which a manager may rely on if there is any question with respect to a particular security. The list is available at http://www.sec.gov/divisions/investment/13flists.htm. Generally, shares of registered closed-end funds and exchange-traded funds (ETFs) are Section 13(f) Securities as well as certain convertible debt securities, equity options, and warrants. Certain swaps may be Section 13(f) Securities if the transaction grants the reporting manager investment discretion over an underlying asset that is a Section 13(f) Security. Shares of mutual funds are not Section 13(f) Securities.

[21] A reporting manager may choose to exclude from its Form 13F any small position in an issuer's Section 13(f) Securities that (a) amounts to less than 10,000 shares, and (b) has an aggregate fair market value of less than $200,000. An excluded position must meet both of these requirements.

[22] To determine the dollar-based monthly average gross short position with respect to each equity security for a reporting month, an institutional investment manager will (a) aggregate the products of (i) the gross short position at the close of regular trading hours on each settlement date during the reporting month, and (ii) the applicable closing price at the close of regular trading hours on each such settlement date, and (b) divide the aggregate dollar value in (a) by the total number of settlement dates in the reporting month.

[23] To determine the percentage-based monthly average gross short position with respect to each equity security for a reporting month, an institutional investment manager will (a) aggregate the percentages found by dividing (i) the gross short position at the close of regular trading hours on each settlement date during the reporting month, by (ii) the number of the applicable public or reporting company's shares outstanding at the close of regular trading hours on each such settlement date, and (b) divide that aggregate percentage in (a) by the total number of settlement dates in the reporting month.

[24] Any gross short position with respect to an ETF will be reported on Form SHO, but a gross short position with respect to any equity security will not take into account any economic exposure from the underlying portfolio securities of an ETF.

[25] According to SEC staff guidance, in determining whether an institutional investment manager meets one of the reporting thresholds for Form SHO, any economic exposure to an equity security through the use of options, swaps and other derivatives should be disregarded. However, once a manager has crossed a reporting threshold for any equity security, the information reported in Form SHO on the net change in the gross short position with respect to that equity security as of any settlement date during a reporting month will take into account any purchase or sale of equity-based options, warrants, swaps and other equity derivatives, conversion of securities, and/or any secondary transactions in the equity security that increased or decreased the manager's gross short position in that equity security.

[26] Under Rule 14Ad-1, a reporting manager exercises voting power when it votes or influences a vote. As an example, a reporting manager exercises voting power when it votes (or directs another party to vote) in accordance with the reporting manager's voting policies or uses its independent judgment or expertise to determine how a client's voting policies should apply to a say-on-pay vote, or when it influences the decision of whether to vote a security, such as determining whether to vote on a say-on-pay matter or whether to recall loaned securities in advance of a vote. A reporting manager will have no reporting obligation with respect to a voting decision that is entirely determined by its client or another party.

[27] Unlike the disclosure requirements under Rule 13f-1, Rule 14Ad-1 is not limited to Section 13(f) Securities and does not include any de minimis exemptions.

[28] Under Rule 16a-1(f), the officers of a public company which are subject to Section 16 are (a) the president, (b) the principal financial officer, (c) the principal accounting officer or controller, (d) any vice president of the issuer in charge of a principal business unit, division, or function, (e) any other officer who performs a policy-making function, or (f) any other person who performs a similar policy-making function for the public company. Officers of the public company's parent(s) or subsidiary(ies) are deemed officers of the public company if they perform such policy-making functions for the public company.

[29] For the purpose of determining a person's initial insider status, Section 16 incorporates the definition of "beneficial ownership" in Section 13(d). See definition in Footnote 3 above and accompanying text.

[30] Insiders of a registered closed-end fund are subject to substantially similar requirements under Section 30(h) of the Investment Company Act of 1940, as amended.

[31] For the persons included in the definition of "Qualified Institution," see Footnote 5 above and accompanying text.

[32] If a registered investment adviser that manages two or more private funds that, in the aggregate, own more than 10% of a public company's equity securities has investments in those funds, there is a risk that the adviser's Qualified Institution status could face legal challenge based on an argument that the adviser does not truly hold the portfolio securities of the funds "for the benefit of third parties."

[33] An insider has an indirect profit interest in the equity securities held by a client if it receives a performance-based fee or allocation from the client, unless (a) the fee or allocation is calculated based on the net capital gains or net capital appreciation of the client's portfolio measured over a period of one year or more, and (b) the public company's equity securities held in the client's portfolio do not account for more than 10% of the market value of the portfolio. Asset-based fees are not considered performance-based fees or allocations and do not trigger Section 16 concerns. Insiders who serve as trustees for a trust may need to comply with Section 16 if the trust beneficially owns over 10% of a registered class of the public company's equity securities.

[34] Previously, an insider also had an obligation to deliver a copy of any Section 16 filing to the public company and the national exchange on which the public company's equity securities were listed. However, Section 929R of the Dodd-Frank Wall Street Reform and Consumer Protection Act eliminated that obligation.

[35] *See* Rule 16a-6 under the Exchange Act.

[36] For example, Rule 16a-3(g) under the Exchange Act provides that, in the case of a transaction made pursuant to (a) a contract, instruction, or written plan that satisfies the affirmative defense conditions of Exchange Act Rule 10b5-1(c), or (b) an employee benefit plan at the volition of a plan participant, where the insider does not select the date of execution of such transaction, the two-day filing requirement for the Form 4 with respect the transaction is calculated from the earlier of (i) the date a broker-dealer or plan administrator notifies the insider of the execution, and (ii) the third business day after the trade date.

[37] Rule 16a-3(k) also requires each public company that maintains a corporate website to post on its website all Forms 3, 4 and 5 filed with respect to its equity securities by the end of the business day after filing with the SEC.

[38] *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, SEC Release No. 34-93784 (Dec. 15, 2021), available at https://www.sec.gov/rules/proposed/2021/34-93784.pdf.

[39] Under proposed Rule 10B-1, a person would be subject to the reporting requirement if any of its security-based swap positions exceed any of the following thresholds: (a) for credit default swaps (CDS), the lesser of: (i) a long notional amount of $150 million, after taking into account the notional amount of any long positions in the debt security underlying the CDS, (ii) a short notional amount of $150 million or (iii) a gross notional amount of $300 million; (b) for swap positions based on debt securities that are not CDS, a gross notional amount of $300 million; and (c) for swap positions based on equity securities (an equity swap position), the lesser of: (i) a gross notional amount of $300 million, but if the gross notional amount of the equity swap position exceeds $150 million, the calculation of the gross notional amount would also include the value of the reporting person's position in the equity securities underlying the swaps (based on the most recent closing price of shares), plus the delta-adjusted notional amount of any options, security futures, or any other derivative instruments based on the same class of equity securities, or (ii) an equity swap position that represents more than 5% of a class of equity securities, but if the equity swap position represents more than 2.5% of a class of equity securities, the calculation would also include in the numerator all of the underlying equity securities owned by the reporting person as well as the number of shares attributable to any options, security futures, or any other derivative instruments based on the same class of equity securities.