# SEC REPORTING OBLIGATIONS UNDER SECTION 13 OF THE EXCHANGE ACT – A PRIMER FOR INVESTMENT MANAGERS

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This legal update summarizes the reporting requirements under Section 13 of the United States Securities Exchange Act of 1934, as amended (the Exchange Act), with a focus on requirements of particular interest to investment and portfolio managers that own, or exercise investment discretion over accounts that own, publicly traded or exchange listed equity securities in the United States (such persons will be referred to herein as an investment manager).

Under Section 13 of the Exchange Act, an investment manager may have an obligation to file reports with the U.S. Securities and Exchange Commission (the SEC) on Schedule 13D, Schedule 13G, Form 13F, and/or Form 13H, each of which is discussed in more detail below. An investment manager (and, in some cases, its parent company or other control persons) generally will have a Section 13 reporting obligation if the firm directly or indirectly:

- beneficially owns, in the aggregate, more than 5% of a class of voting equity securities that are registered under Section 12 of the Exchange Act and traded on U.S. exchanges (referred to herein as Schedule 13 Securities) See Section A, *Schedules 13D and 13G* below.
- manages discretionary accounts 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 Section B, *Form 13F* below); or
- manages discretionary accounts that trade in NMS securities (generally exchange-listed equity securities and standardized options as described below of at least (i) 2 million shares or shares with a fair market value of over $20 million during a day, or (ii) 20 million shares or shares with a fair market value of over $200 million during a calendar month (see Section C, *Form 13H:* below).

**A. Schedules 13D and 13G: Reporting Significant Ownership Positions in Public Companies**

Sections 13(d) and 13(g) of the Exchange Act require an investment manager who acquires or has beneficial ownership of more than 5% of a class of an issuer's Schedule 13 Securities (the "Section 13 Threshold") to report such beneficial ownership on Schedule 13D or Schedule 13G, depending on the circumstances. The two schedules share a common base, although Schedule 13G is a shorter alternative to Schedule 13D that is available where an investment is made without activist intent (as elaborated below). Both schedules require background information about the reporting investment manager and the Schedule 13 securities listed, including the name, address, and citizenship or place of organization of each reporting person, the amount of Schedule 13 securities beneficially owned and the corresponding beneficial ownership percentage, and whether voting and investment power is held solely by the reporting person or shared with others. Those persons filing on Schedule 13D are additionally required to disclose further information, including certain disciplinary events, the source and amount of funds or other consideration used to purchase the Schedule 13 securities, the purpose of such acquisition, any plans to change or influence the control of the issuer and a list of any transactions in the securities over the last 60 days.

Schedule 13G: Passive Investors / Qualified Institutions

An investment manager may use the less burdensome Schedule 13G if its ownership is considered "passive." Passive investors are in essence investors that do not intend to control or change the control of a company. An investment manager that is a passive investor does not have an obligation to notify discretionary account owners of a potential reporting obligation if the investment manager crosses the Section 13 threshold on such person's behalf. An investment manager filing as a passive investor must file a Schedule 13G within 10 days of crossing the Section 13 threshold.

An investment manager that is a registered investment adviser or broker-dealer may also file a Schedule 13G as a "Qualified Institution" if it (a) acquired its position in a class of an issuer's Schedule 13 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, and (c) promptly notifies any discretionary account owner on whose behalf the firm holds more than 5% of the Schedule 13 securities of such account owner's potential reporting obligation. An investment manager filing as a Qualified Institution must file an initial Schedule 13G within 45 days of the end of the calendar year in which the investment manager exceeds the Section 13 threshold. Since the Section 13 threshold for a Qualified Institution is calculated as of the end of a calendar year, a Qualified Institution that acquires (directly or indirectly) more than 5% of a class of Schedule 13 securities over the course of a year, but as of December 31 has reduced its interest below the 5% threshold, will not be required to file an initial Schedule 13G. However, a Qualified Institution that acquires beneficial ownership (direct or indirect) of more than 10% of a class of Schedule 13 securities must file an initial Schedule 13G within 10 days after the first month in which the person exceeds the 10% threshold.

In determining whether an investment manager has crossed the Section 13 threshold with respect to a class of Schedule 13 securities, 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, accounts managed by or for principals and employees, and accounts managed for no compensation), and positions held in any accounts managed by the firm's control persons (which may include certain officers and directors) for themselves, their spouses, and dependent children (including IRA and trust accounts).

A reporting person who is not eligible to use Schedule 13G must file a Schedule 13D within 10 days of such reporting person's direct or indirect acquisition of beneficial ownership of more than 5% of a class of Schedule 13 securities.

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

Amendments to Schedule 13G

If an investment manager previously filed a Schedule 13G and there has been any change to the information reported in such Schedule 13G as of the end of a calendar year, then an amendment to such Schedule 13G must be filed within 45 days of the calendar year end. A reporting person is not required to make an annual amendment to Schedule 13G if there has been no 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 Schedule 13 securities outstanding (e.g., due to an issuer's buyback of securities).

What is "beneficial ownership"?

Under Rule 13d-3 of the Exchange Act, "beneficial ownership" of a security exists if a person, directly or indirectly, through any contract, arrangement, understanding, or relationship or otherwise, has or shares voting power and/or investment power over a security. "Voting power" means the power to vote or direct the voting of a security. "Investment power" means the power to dispose of or direct the disposition of a security. A person holding securities-based swaps or other derivative contracts may be deemed to beneficially own the underlying securities if the swap or derivative contract provides the holder with voting or investment power over the underlying securities.

Obligations of a Firm's Control Persons

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

- any general partner, managing member, trustee, or controlling shareholder of the investment manager; and
- the direct or indirect parent company of the investment manager and any other person that exercises indirect control.

If an investment manager is directly or indirectly owned by two partners, members, trustees, or shareholders, generally each such person is deemed to be a control person. For example, if a private fund that beneficially owns more than 5% of a class of Schedule 13 securities is managed by an investment manager that is in turn is owned in roughly equal proportions by two managing members, then each of the private fund, the investment manager and the two managing members of the manager likely will have independent Section 13 reporting obligations.

In a 1987 SEC no-action letter regarding *Southland Corp.* (August 10, 1987), 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 considered the beneficial owner of the trust's portfolio securities for purposes of Section 13(d) of the Exchange

Act. This articulation has given rise to what practitioners refer to as the "rule of three," which provides that, where voting and investment decisions regarding a portfolio are made by three or more persons and a majority of those persons must consent to voting and investment decisions, then none of those persons has independent 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. 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.

Availability of Filing on Schedule 13G by Control Persons

Any direct and indirect control person of an investment manager may file a Schedule 13G as a "passive investor" to the same extent as the manager discussed 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 Schedule 13 securities may be held (i) directly by the control person or (ii) directly or indirectly by any of its subsidiaries or affiliates that are not Qualified Institutions. In particular, a control person of an investment manager will not qualify as a Qualified Institution if more than 1% of a class of Schedule 13 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."

Switching from Schedule 13G to Schedule 13D

If an investment manager that previously filed a Schedule 13G no longer satisfies the conditions to be a Qualified Institution or passive investor, the person must switch to reporting on Schedule 13D (assuming that the person continues to exceed the Section 13 threshold). Such requirement to switch may occur in the case of (1) a reporting person that changes its intent from passive investment to an activist intent, (2) an investment manager that is a Qualified Institution that deregisters as an investment adviser, or (3) a reporting person that is a passive investor that acquires 20% or more of a class of Schedule 13 securities. In each case, the reporting person must file a Schedule 13D within 10 days of the relevant event (except that, if a former Qualified Institution is able to qualify as a passive investor, such person may simply amend its Schedule 13G within 10 days to switch its status).

The investment manager will thereafter be subject to the Schedule 13D reporting requirements with respect to the Schedule 13 securities until such time as the former Schedule 13G reporting person once again qualifies as a Qualified Institution or passive investor with respect to the Schedule 13 securities or has reduced its beneficial ownership interest below the Section 13 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 to reporting on Schedule 13G.

Grandfathered Investor

Note that an investment manager who acquired shares in a private company would still need to report under Schedule 13D/G following a going-public transaction. If, following the IPO, the investment manager had not acquired more than 2% of the outstanding shares in any 12-month period, it would be eligible to use Schedule 13G for such purpose.

**B. Form 13F: Reporting Equity Positions of 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 institutional investment manager that exercises investment discretion over one or more accounts holding equity securities that (1) are traded on a national securities exchange (the Traded Securities), and (2) 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 13F threshold). Form 13F requires an institutional investment manager that meets the 13F threshold (a reporting manager) to report the amount and value of the Traded Securities held in its discretionary accounts both in the aggregate and on an issuer-by-issuer basis. A reporting manager must file Form 13F (a) within 45 days after the last day of each calendar year in which it meets the 13F threshold, and (b) 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 Traded Securities held in a reporting manager's discretionary accounts falls below the 13F threshold during the calendar year. Accordingly, once an investment manager's obligation to report on Form 13F is established, the manager must make four quarterly filings with the SEC.

According to the SEC, the purpose of this disclosure requirement is to collect and disseminate to the public information about the holdings and investment activities of institutional money managers in order to assist investors, issuers and government regulators. The information gathered may be used to assist government regulators. The SEC also uses the information to analyze the influence and impact of institutional investment managers on the securities markets. The SEC may use the information to craft changes in public policy based on the market influence of institutional investment managers.

Reporting of Shared Investment Discretion

When two or more investment managers share investment discretion over the same Traded Security (for example, as a result of a sub-advisory arrangement or through some type of 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 Traded Security, the investment 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 an investment manager includes all Traded Securities over which it or any other investment manager exercises investment discretion;
- 13F Notice – on which an investment manager indicates that all Traded Securities over which it exercises investment discretion are reported on a Form 13F filed by another investment manager; and
- 13F Combination Report – on which an investment manager includes some, but not all, of the Traded Securities over which it exercises investment discretion, and indicates that the remaining securities are reported on a Form 13F filed by another investment manager.

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

Reporting Obligations of Control Persons and Clients

Any control persons that make decisions as to how an investment manager exercises its investment discretion with respect to the Traded 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 fund 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 Traded Securities since the obligation is tied to the exercise of investment discretion. However, it is possible that a reporting obligation may arise if the fund itself actually engages in the investment decision-making process (such as through an internal investment committee whose decisions bind the institutional investment manager).

Further information regarding Form 13F reporting can be found at the following link, which includes links to the SEC's complete list of Traded Securities, maintained on a regular basis.

https://www.sec.gov/divisions/investment/13ffaq.htm

**C. Form 13H: Reporting Identifying Information for Large Traders**

Rule 13h-1 of the Exchange Act requires a Form 13H to be filed with the SEC by any individual or entity (such person, a Large Trader) that, directly or indirectly, exercises investment discretion over one or more accounts and effects transactions in certain NMS Securities (as defined below) for those accounts through one or more registered broker-dealers that, in the aggregate, equal or exceed (i) 2 million shares or $20 million in fair market value during any calendar day, or (ii) 20 million shares or $200 million in fair market value during any calendar month (each, a threshold trading level). Under the SEC's Regulation National Market System (NMS), an "NMS Security" is defined to include any U.S. exchange-listed equity securities and any standardized options, in each case for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan (or an effective national market system plan for reporting transactions in listed options). A Large Trader must file an initial Form 13H within 10 days after effecting aggregate transactions equal to or greater than one of the threshold trading levels outlined above. Amendments to Form 13H must be filed within 45 days after the end of each full calendar year and then 10 days following the end of a calendar quarter if any of the information on Form 13H becomes inaccurate.

The purpose of the Form 13H requirement is to enhance the ability of the SEC to identify large market participants, collect information on their trading and analyze their trading activity.

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. The information is, however, subject to disclosure to Congress and other federal agencies and when ordered by a court. If an investment adviser 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.

Further information regarding the SEC's Large Trader reporting and the Form 13H can be found at the following link:

https://www.sec.gov/divisions/marketreg/large-trader-faqs.htm

**Bonus Section: Form PF - Reporting for Private Funds**

Although not part of Exchange Act Section 13 reporting, investment managers who manage private funds must also submit reports on Form PF. Form PF is required to be filed on a quarterly or annual basis (depending on the size and type of investment manager) by SEC-registered investment advisers (and those required to be SEC-registered) who manage any number of private funds with at least $150 million in private fund assets under management as of the adviser's most recent fiscal-year end. The purpose of Form PF is to provide the Financial Stability Oversight Council (FSOC), created by the Dodd-Frank financial reform legislation, with data to identify systemic trends in the private fund industry and to assist in monitoring systemic risks to the U.S. financial markets.

Form PF requires significant data collection across funds, managed accounts and portfolio companies. Detailed information required to be reported encompasses, among other things, (i) exposure to specific financial institutions and credit counterparties, (ii) concentration of fund investments by industry and geography, and (iii) concentration of investor base. Question 16 of Form PF Section 1(b) calls for advisers to specify the percentage of each private fund beneficially owned by certain enumerated categories of investors—proper classification here may require solicitation of relevant information from investors. On balance, however, the information required to complete Form PF should already exist within the adviser's organization, and the Form PF reporting exercise is generally an exercise in gathering, regrouping and recalculating such data.

Further information regarding the Form PF reporting and frequently asked questions can be found at the following link:

https://www.sec.gov/divisions/investment/pfrd/pfrdfaq.shtml

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