NOTES

A LITTLE LETTER, A BIG DIFFERENCE: AN EMPIRICAL INQUIRY INTO POSSIBLE MISUSE OF SCHEDULE 13G/13D FILINGS

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Much attention has recently been given to the current Securities and Exchange Commission reporting requirements for Schedule 13D, the beneficial ownership form many investors must file to report their equity holdings. However, relatively less focus has been given to the Schedule 13G, the short-form filing option, which requires less information and tends to attract less attention. The choice between the 13G or the 13D filing can come down to one highly subjective factor: the self-professed passivity of the investor. This Note introduces a theory of why truly active investors may choose to file on the Schedule 13G by surveying the costs and benefits associated with improperly filing under the current reporting regime. To further support this argument, the Note also investigates empirical trends of investor switches between the two filings in order to detect possible systemic misuse of the filing. Finally, the Note recommends enhancements to the supervisory framework and filing requirements that can help combat improper use of the 13G filing by truly active investors.

INTRODUCTION

Out of the 2005 merger between retail giants Sears and Kmart, a battle emerged over two little letters: *D* and *G*.[1] ESL Partners (ESL), an investment entity controlled by Kmart Chairman Edward Lampert, was hit with a class action lawsuit in which plaintiffs alleged ESL's reporting of its newly acquired ownership position in Sears on a Schedule 13*G* (instead of a Schedule 13*D*) was a materially misleading disclosure in violation of applicable securities law.[2]

Under the current framework, investors taking a beneficial ownership interest in certain classes of securities must report details of their holdings on one of two public-filing options: a Schedule 13G or Schedule

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1. Proposed Second Amended Class Action Complaint, Levie v. Sears Roebuck & Co., 676 F. Supp. 2d 680, (N.D. Ill. 2009) (No. 104CV07643), 2008 WL 2777454 [hereinafter Proposed Second Amended Class Action Complaint].

2. Id. at *8–9.

13D.[3] A Schedule 13G is a short-form filing that can be utilized if an investor holds a beneficial ownership interest passively, with no intent to change control of the company.[4] Those investors with activist intentions must file a more detailed Schedule 13D, which along with other information, requires the investor to state its future intentions with respect to influencing control of the company.[5] The plaintiffs in *Levie v. Sears Roebuck & Co.* alleged that, in filing a Schedule 13G, defendants materially misled the markets into thinking they harbored no activist intentions.[6]

From the initial Schedule 13G filing on July 1, 2004, until the day the merger was finalized and announced on November 16, 2004,[7] ESL had maintained that its Sears stocks "were not acquired and are not held for the purpose of or with the effect of changing or influencing control."[8] The company maintained this position despite Lampert's heavy involvement in merger discussions throughout October and November as well as ESL's agreement to vote its shares in favor of a merger.[9] Although the court ultimately determined that this behavior did not amount to a violation of securities law,[10] the dispute does frame an important issue: possible misuse of the passive-indicating Schedule 13G by truly activist investors.

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3. See infra section I.A (detailing history and language of this statutory requirement).

4. See infra section I.B (discussing information required under each regulatory filing). Although there are other possible reasons for utilizing the 13G filing (such as for institutional investors and other limited exemptions, see infra notes 27–29 and accompanying text), this Note will focus primarily on the passive investor exception.

5. See infra note 45 and accompanying text (listing required disclosure items under Schedule 13D).

6. Proposed Second Amended Class Action Complaint, supra note 1, at *6–9.

7. ESL eventually filed a Schedule 13D indicating an activist intent on the day the merger was announced. Sears, Roebuck & Co., Schedule 13D (Form SC 13D) (Nov. 16, 2004), http://www.sec.gov/Archives/edgar/data/319256/000095012304013931/y69027ssc13d.txt [http://perma.cc/GH4E-LMH6] (filed by ESL Investments, Inc.) (indicating switch from Schedule 13G to Schedule 13D on cover page).

8. Proposed Second Amended Class Action Complaint, supra note 1, at *6–7 (quoting certification language of 13G filing).

9. Levie v. Sears Roebuck & Co., 676 F. Supp. 2d 680, 684–85 (N.D. Ill. 2009) (No. 104CV07643), 2008 WL 2777454 (relaying uncontested facts in case).

10. The court determined that Lampert was conducting the negotiations on his own behalf, not on ESL's. Id. at 689. Furthermore, because the agreement to support a merger was not memorialized before November 12, 2004, ESL was still within the allowed ten-day window in which ESL was required to switch to a 13D. Id.; see also infra notes 94–98 and accompanying text (discussing Sears merger further). See generally Milbank, Tweed, Hadley & McCloy LLP, Federal Court Provides Guidance on the Timing for Securities Law Disclosures in Connection with M&A Negotiations, Corporate Governance Group Client Alert (Jan. 14, 2010), http://www.milbank.com/images/content/6/4/641/011410Levie-v-Sears-Roebuck-Co.pdf [http://perma.cc/48SA-ZRC9] (detailing case and impact). For additional discussion on the ten-day filing window, see infra note 46 (surveying current policy debate over reducing time allowed for disclosure).

The benefits to reporting under this short-form filing can be great, as it allows the filer to avoid increased market and regulatory scrutiny.[11] This is an enticing reason for truly active investors, such as corporate raiders or activist hedge funds, to file passivity-indicating Schedule 13Gs.[12] As the distinction between a passive and an activist intention is largely constrained to the psyche of the investor, the risks of being caught for such misuse may be minimal under the current reporting framework (absent some objectively identifiable evidence of such intent).[13] To date, the Securities and Exchange Commission (SEC or Commission) has not brought an enforcement action against an active investor for improperly filing the 13G short-form schedule in lieu of the 13D schedule,[14] nor have civil litigants been very successful in their own challenges to such behavior.[15] This may suggest a high-reward, low-risk situation—an environment ripe for abuse.

To date, there has been little scholarly inquiry into whether active investors may be inappropriately utilizing 13G filings. In order to fill this gap in the literature, Parts II and III of this Note advance both a theory for why misuse of the 13G filing may be occurring and an empirical analysis surveying historical securities filings in an effort to evaluate that theory. The findings of this Note may or may not convince policymakers that misuse of the 13G filing is prevalent behavior requiring attention. However, should policymakers find that the topic warrants additional regulatory intervention, Part IV of this Note suggests possible avenues to fight against unlawful filing tactics.

Part I lays out the legislative and regulatory framework governing these reporting requirements. Part II surveys the costs and benefits associated with improperly filing under a Schedule 13G and theorizes why active investors may choose to improperly utilize the 13G filing. Part III investigates, at the macro level, empirical data of investors switching from passivity-indicating 13G filings to activist-indicating Schedule 13D filings and uncovers trends suggesting possible misuse of the filings. Finally, Part IV suggests enhancements to the supervisory framework and filing requirements that policymakers could consider when taking steps to combat improper filings.

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11. See infra section II.C (discussing benefits to activist investors who misuse 13G filings).

12. See infra section II.B (discussing problems of subjectivity and incentives to avoid disclosures).

13. See infra notes 72–73 and accompanying text (discussing problem of subjectivity with respect to identifying true control purpose of investor).

14. See infra note 139 and accompanying text (highlighting lack of SEC enforcement actions corresponding to type of misuse discussed in this Note).

15. See infra notes 93–108 and accompanying text (noting previous controversies over alleged abuse of 13G filing option).

I. THE LEGISLATIVE AND REGULATORY FRAMEWORK GOVERNING 13G AND 13D FILINGS

Part I of this Note discusses the legislative and regulatory framework governing the 13G and 13D filing types. Section I.A introduces the legislative history and statutory language governing these reporting requirements. Section I.B then discusses the development of the regulatory framework under the SEC and summarizes what information is currently required (and not required) under Schedules 13G and 13D.

A. *Section 13(d) of the Williams Act*

In 1968, Congress enacted a series of amendments to the Securities Exchange Act of 1934 (1934 Act)[16] in an attempt to increase regulation of tender offers and accumulations of stock.[17] These amendments were intended to close a gap in securities laws that existed at the time. Although individuals seeking to gain control[18] of a company through a proxy contest were already required to abide by section 14(a) of the 1934 Act,[19] there were no corresponding regulations in connection with cash tender offers.[20] These amendments have collectively come to be known as the Williams Act.[21]

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16. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified at 15 U.S.C. § 78a (2012)). The 1934 Act forms the basis of securities regulation in the United States. In addition to its laws governing the trading of securities in secondary markets, the 1934 Act established the SEC as the primary regulator of these markets. It can be contrasted with the Securities Exchange Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified at 15 U.S.C. § 77a), which governs primary markets, i.e. original issuances of securities.

17. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified at 15 U.S.C. § 78).

18. Under SEC regulations, "[t]he term 'control' . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 240.12b-2 (2015).

19. See GAF Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971) ("[I]ndividuals seeking control through a proxy contest were required to comply with section 14(a) of the Securities Exchange Act and the proxy rules promulgated by the SEC, and those making stock tender offers were required to comply with the applicable provisions of the Securities Act . . . .").

20. H.R. Rep. No. 90-1711, at 4 (1968) ("The [Williams Act] would correct the current gap in our securities laws by amending the Securities Exchange Act of 1934 to provide for full disclosure in connection with cash tender offers and other techniques for accumulating large blocks of equity securities of publicly held companies."), reprinted in 1968 U.S.C.C.A.N. 2811, 2814. A proxy contest occurs when corporate activists persuade other shareholders to vote for the installment of a new management. A cash tender offer, by contrast, requires the activist to purchase a controlling interest in the company, giving the activist enough voting power to change management without gathering support from other shareholders.

21. The five original sections of the Williams Act consist of section 13(d) (requiring disclosures related to beneficial ownership and the focus of this Note), section 13(e) (relating to issuer purchasing its own securities), section 14(d) (requiring disclosure, filing, and dissemination-related compliance in tender offers), section 14(e) (requiring no mis-

Of relevance here is section 13(d), which governs disclosures of beneficial ownership interests in excess of five percent of certain classes of equity securities.[22] Section 13(d) states that any person acquiring a beneficial ownership in these securities must file an ownership report with the SEC.[23] The information required in this report includes the background and identity of the investor, the investor's purpose for acquiring the stock, the number of shares that are beneficially owned, and arrangements or understandings with the issuer with respect to any future transfers of securities.[24] The statute also allows the SEC discretion to require in the report any "additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors."[25] This filing must be submitted within ten days of the acquisition "or within such shorter time as the Commission may establish by rule."[26]

Recognizing that continually filing such detailed information would be a burdensome requirement for certain institutional investors and professionals in the securities industry, Congress passed another amendment in 1970 to include section 13(d)(5).[27] Section 13(d)(5) allows the SEC to promulgate a short-form filing option. The section states: "The Commission . . . may permit any person to file in lieu of [the long-form schedule] a notice stating the name of such person, the number of shares . . . the date of their acquisition and such other information as the Commission may specify . . . ."[28] The statute goes on to specify that this exception applies only if "such securities were acquired by such person in the *ordinary course of his business* and were *not acquired for the purpose of and do not have the effect of changing or influencing the control* of the issuer."[29]

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representations or omissions of material fact in section 14(d) filings), and section 14(f) (requiring mini-proxy statement regarding elections of majority of board other than at stockholder meetings for those acquiring securities pursuant to section 13(d) or section 14(d)). 15 U.S.C. § 78m. The sixth section, section 13(g), was enacted by later amendments through the Domestic and Foreign Investment Improved Disclosure Act of 1977, Pub. L. No. 95-213, § 203, 91 Stat. 1494, 1499 (codified at § 78m(g)). See infra notes 30–34 and accompanying text for further discussion of section 13(g).

22. 15 U.S.C. § 78m(d), (g).

23. Id. § 78m(d)(1).

24. Id. § 78m(d)(1)(A)–(E).

25. Id. § 78m(d)(1). For a history of administrative amendments and information required pursuant to this grant of discretion, see Arnold S. Jacobs, The Williams Act—Tender Offers and Stock Accumulations 2015 Edition § 2:35 (2015).

26. 15 U.S.C. § 78m(d)(1). For additional discussion on the ten-day filing window, see infra note 46 (surveying current policy debate over reducing time allowed for disclosure).

27. Act of Dec. 22, 1970, Pub. L. No. 91-567, § 1, 84 Stat. 1497, 1497 (codified at 15 U.S.C. § 78m(d)(5)) (an act to amend sections 13(d), 13(e), 14(d), and 14(e) of the Securities Exchange Act of 1934 in order to provide additional protection for investors).

28. Id.

29. Id. (emphasis added).

In 1977, Congress passed another amendment to the 1934 Act[30] to include section 13(g), which like section 13(d)(5) allowed for a more limited "[s]tatement of equity security ownership."[31] Legislative history shows that section 13(g) was intended to "supplement the current statutory scheme by providing legislative authority for certain additional disclosure requirements that in some cases could not be imposed administratively."[32] The principal effect of section 13(g), therefore, was to close the gaps previously described in the disclosure requirements under section 13(d).[33] The information required under section 13(g) included only the person's identifying information, the number of and description of the shares, and the nature of the interest.[34] As previously noted, section 13(d)(5) required similar information.[35] Taken together, these sections would form the basis for a short-form filing option: the Schedule 13G.[36]

There are several public policy reasons for mandating these reporting requirements, as enunciated by legislative history and later courts. As a primary matter, section 13(d) was *not* intended to be "an ownership reporting provision of general application."[37] Instead, the purpose of the section focused on informing investors about purchases of large blocks of shares acquired in a short period of time by individuals who could then influence or change control of the issuing company.[38] This is necessary

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30. Domestic and Foreign Investment Improved Disclosure Act of 1977, Pub. L. No. 95-213, § 203, 91 Stat. 1494, 1499 (codified at 15 U.S.C. § 78m(g)).

31. Id. (quoting section title).

32. S. Rep. No. 95-114, at 13 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4111.

33. Filing and Disclosure Requirements Relating to Beneficial Ownership, Exchange Act Release No. 15348, 16 SEC Docket 228, 229 (Nov. 22, 1978).

34. 15 U.S.C. § 78m(g)(1)(A)–(B).

35. See supra note 28 and accompanying text (reciting text of section 13(d)(5)).

36. The Commission's authority to require a form containing less disclosure than a Schedule 13D comes from a joint reading of section 13(g)(1) and section 13(d)(5). Although the Commission would come to name the short-form filing "Schedule 13G," it is technically authorized pursuant to section 13(d)(5), which empowers the Commission to adopt short-form statements. See Filing and Disclosure Requirements Relating to Beneficial Ownership, Securities Act Release No. 5925, Exchange Act Release No. 14692, Investment Company Act Release No. 10212, 14 SEC Docket 861, 865–67 (Apr. 21, 1978) (detailing how adoption of section 13(g) impacted short-form schedule promulgated under Rule 13d-5).

37. Exchange Act Release No. 15348, supra note 33.

38. See H.R. Rep. No. 90-1711, at 8 (1968) ("The purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time."), reprinted in 1968 U.S.C.C.A.N. 2811, 2818; S. Rep. No. 90-550, at 7 (1967) (reciting same language); see also Hallwood Realty Partners, L.P. v. Gotham Partners, L.P., 286 F.3d 613, 620 (2d Cir. 2002) ("The aim of § 13(d) is to ensure that investors will be informed about purchases of large blocks of shares."); GAF Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971) ("[T]he purpose of section 13(d) is to alert the marketplace to every large, rapid aggregation or accumulation of securities,

information for investors, as "[o]therwise, investors cannot assess the potential for changes in corporate control and adequately evaluate the company's worth."[39] Creeping control acquisitions have the potential to deny the other shareholders an opportunity to command a "control premium."[40]

Disclosure requirements in section 13(d)—and throughout the Williams Act—were intended to provide shareholders with adequate information to decide whether to accept a tender offer.[41] Titles of both the House and Senate reports touted the importance of investor protection.[42] Section 13(d) was not, however, an attempt to "provide a weapon for management to discourage takeover bids or prevent large accumu-

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regardless of technique employed, which might represent a potential shift in corporate control . . . .").

Because the purpose is to protect against undisclosed changes in control, certain "exempt" persons who do not pose a risk of causing rapid shifts in corporate control are allowed to utilize the 13G short form filing under Exchange Act section 13(d)(6), § 78m(d)(6), and SEC Rule 13d-5, 17 C.F.R. § 240.13d-1(d)(5) (2015).

39. *GAF Corp.*, 453 F.2d at 717.

40. John C. Coffee, Jr., Hedge Fund Activism: New Myths and Old Realities, CLS Blue Sky Blog (May 19, 2014), http://clsbluesky.law.columbia.edu/2014/05/19/hedge-fund-activism-new-myths-and-old-realities/ [http://perma.cc/MV4B-S59Z] ("[C]reeping control acquisitions deny the public shareholders their opportunity for a control premium, and traditionally the key function of the target's board of directors in the takeover context is to protect this opportunity."). Black's Law Dictionary defines "control premium" as: "A premium paid for shares carrying the power to control a corporation." Control Premium, Black's Law Dictionary (10th ed. 2014). A control premium exists because having a controlling interest in a company comes with valuable benefits, such as the right to select management, enter contracts, or even liquidate the company. See generally, Philip Saunders, Jr., Control Premiums, Minority Discounts, and Marketability Discounts, http://www.philipsaunders.com/TheFirm/Publications/ControlPremiums/tabid/96/Default.aspx [http://perma.cc/2RYK-5SHM] (last visited Sept. 14, 2015) ("Stockholders holding a controlling interest in a company can determine the nature of the business; select management; enter into contracts; buy, sell, and pledge assets; borrow money; issue and repurchase stock; register stock for public offering; and liquidate, sell, or merge the company.").

41. Senator Harrison Williams, the bill's sponsor and namesake, stated:

> Today, the public shareholder in deciding whether to accept or reject a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent.

113 Cong. Rec. 24,664 (1967) (statement of Sen. Williams). He also noted that section 13(d) may be "the only way that corporations, their shareholders and others can adequately evaluate a tender offer or the possible effects of a change in substantial shareholdings." 113 Cong. Rec. 855 (1967) (statement of Sen. Williams); see also Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) ("The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information . . . .").

42. See H.R. Rep. No. 90-1711, at 4 (titling section "Protection of Investors"); S. Rep. No. 90-550, at 3 (same).

lations of stock which would create the potential for such attempts."[43] Therefore, neutrality between investor and issuer was paramount when adopting the disclosure requirements.

B. *Regulatory Framework*

Pursuant to its statutory authority, the SEC has promulgated rules concerning both long-form and short-form filings in the form of Rule 13d-1: "Filing of Schedules 13D and 13G."[44] As adopted by the SEC, the current Schedule 13D requires the following: the cover page; Item 1: security and issuer; Item 2: identity and background; Item 3: source and amount of funds and other consideration; Item 4: purpose of the transaction; plans and proposals; Item 5: interest in securities of the issuer; Item 6: contracts, arrangements, understandings, and relationships with respect to securities of the issuer; and Item 7: material to be filed as exhibits.[45] The report must be filed within ten days of the acquisition.[46] Any "material" change in the facts included in a Schedule 13D requires the investor to "promptly" file an amendment to the schedule.[47]

Schedule 13G was first adopted by the SEC on February 24, 1977 (then called Schedule 13D-5).[48] It was officially designated as Schedule

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43. *Rondeau*, 422 U.S. at 58. The Court in *Rondeau* also noted: "[T]he Act's draftsmen commented upon the 'extreme care' which was taken 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.'" Id. at 58–59 (quoting H.R. Rep. No. 90-1711, at 4; S. Rep. No. 90-550, at 3).

44. 17 C.F.R. § 240.13d-1 (2015).

45. SEC, Schedule 13D Blank Form, 17 C.F.R. § 240.13d-101.

46. The ten-day window required under SEC rules coincides with the maximum time allowed under the statutory language of section 13(d)(1). This timing is the source of heated debate in the area of corporate governance policymaking, with proponents pushing the Commission to utilize their authority under section 13(d)(1) to establish a rule shortening this window. Compare Letter from Wachtell, Lipton, Rosen & Katz (WLRK), Petition for Rulemaking Under Section 13 of the Securities Exchange Act of 1934, at 2 (Mar. 7, 2011), http://www.wlrk.com/docs/Letter_to_the_SEC_re_%2013%28d%29%28final%20version%29.pdf [http://perma.cc/V6KC-AK89] (arguing "current narrow definition of beneficial ownership and the ten-day reporting lag . . . facilitate market manipulation and abusive tactics"), with Lucian A. Bebchuck & Robert J. Jackson, Jr., The Law and Economics of Blockholder Disclosure, 2 Harv. Bus. L. Rev. 39, 53 (2015) (arguing there is currently no evidence trading patterns and technologies have changed in ways that would require tightening disclosure thresholds).

47. 17 C.F.R. § 240.13d-2(a). The rules give some guidance as to what constitutes "material": "An acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed 'material' for purposes of this section." Id. As to what constitutes "promptly," there is no bright-line test: "[T]he question of whether an amendment is prompt will be determined based on all of the facts and circumstances surrounding both prior disclosures by the filing person and the material changes which trigger the obligation to amend." Cooper Labs., Inc., Exchange Act Release No. 22171, 33 SEC Docket 647, 651 (June 26, 1985).

48. Various Proposals Relating to Disclosure of Beneficial Owners, Securities Act Release No. 5609, Exchange Act Release No. 11616, 7 SEC Docket 696, 696 (Aug. 25, 1975) ("The proposed rules and amendments under Sections 13 and 14 of the Exchange

13G through later amendments.[49] The investors who were originally permitted to file under this short-form schedule include specified institutional investors, such as banks, brokerage houses, and investment companies or advisors.[50] Importantly, Schedule 13G was only available to these persons if the securities were held in the "ordinary course of . . . business."[51] Schedule 13G generally required updating only once a year, and required no disclosure statement as to the investor's purpose or intentions (the chief benefits over a Schedule 13D, which requires detailed purpose and intent disclosures and prompt amendments for material changes).[52] Amendments to 13G filings under this section were only required within forty-five days after the end of each calendar year,[53] except that when passing a ten percent ownership threshold, an amendment was required within ten days after the end of the month of acquisition.[54]

The SEC, in amendments adopted in 1998, significantly expanded the short-form 13G filing option by including a new category of allowed investors: self-proclaimed passive investors.[55] Rule 13d-1(c) now allowed a person that would otherwise be required to file a long-form Schedule 13D to elect to make a short-form filing on Schedule 13G, provided that person:

> (1) Has not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect . . . ;
> (2) Is not a person reporting pursuant to paragraph (b)(1) of this section; and
> (3) Is not directly or indirectly the beneficial owner of 20 percent or more of the class.[56]

In adopting these amendments, the SEC noted that "[t]he existing reporting scheme imposed unnecessary disclosure obligations on persons whose acquisitions do not affect the control of issuers."[57] The hope was

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Act would . . . provide a short form acquisition notice, *Form 13D-5*, to be used by certain persons who acquire securities in the ordinary course of their business and not for purposes of control . . . ." (emphasis added)).

49. Exchange Act Release No. 14692, supra note 36, at 864.

50. 17 C.F.R. § 240.13d-1(b)(1)(ii).

51. Id. § 240.13d-1(b)(1)(i).

52. See supra notes 45–47 and accompanying text (discussing disclosure and amendment requirements for filers under Schedule 13D).

53. 17 C.F.R. § 240.13d-2(b).

54. Id. § 240.13d-2(c). The filer must submit additional amendments for each subsequent change in ownership of more than five percent, again to be filed within ten days from the end of the month in which the acquisition or divestiture took place. Id.

55. Amendments to Beneficial Ownership Reporting Requirements, Exchange Act Release No. 39538, 66 SEC Docket 596, 597 (Jan. 12, 1998).

56. 17 C.F.R. § 240.13d-1(c).

57. Exchange Act Release No. 39538, supra note 55.

that reducing the number of 13D filings would allow for the market and the SEC to more easily identify and focus on filers who had the potential to change or influence control.[58] However, the SEC admitted that "a control purpose reflects the state of mind of a filing person and there are incentives to disclose less information."[59] Therefore, the Commission adopted two safeguards. First, initial 13G filings for passive investors under section 13d-1(c) must be filed within ten days of acquisition of more than five percent ownership interest (instead of forty-five days after the acquisition year),[60] and amended filings must be made "promptly" upon additional acquisitions of more than five percent of the class (instead of ten days after the acquisition month).[61] Second, if the person no longer holds the investment passively, or if the person surpasses the twenty percent threshold, he or she must file a long-form 13D within ten days and abide by a cooling-off period after this 13D filing.[62] This cooling-off period requires that an investor may not vote or direct the vote of his or her securities nor acquire an additional beneficial ownership interest in the ten days following the switched filing.[63]

58. Id.

59. Id.; see also infra section II.C (analyzing aforementioned incentives).

60. Compare 17 C.F.R. § 240.13d-1(c) (describing initial reporting requirements for filers under passive investor exception), with id. § 240.13d-1(b) (describing initial reporting requirements for other classes of investors allowed to report under the 13G Schedule—"qualified institutional investors" and "exempt investors").

61. Compare 17 C.F.R. § 240.13d-2(b), (d) (describing amendment requirements for filers under passive investor exception), with id. § 240.13d-2(b), (c) (describing amendment requirements for filers under institutional investor exception).

62. Id. § 240.13d-1(e)–(f).

63. Id. § 240.13d-1(e)(2). However, it has been suggested that "an investor would not appear to be prohibited during the cooling-off period from soliciting proxies, making shareholder proposals, or even announcing a tender offer." Marcia L. MacHarg, Alan H. Paley & William D. Regner, Debevoise & Plimpton LLP, SEC to Permit "Passive Investors" to Use Short-Form Schedule 13G 3 (Jan. 29, 1998) (on file with the *Columbia Law Review*).

TABLE 1: SUMMARY OF DIFFERENT BENEFICIAL OWNERSHIP FILINGS

Filing Name (Filer Type)	**Time to Initially File**	**Cause to Amend**	**Time to Amend**
Schedule 13D (Default Filing)	Within 10 days of acquisition. § 240.13d-1(a).	Any "material" change, including change in ownership of 1% or more. § 240.13d-2(a).	"[P]romptly." § 240.13d-2(a).
Schedule 13G (Exempt and Institutional Investors)	Within 45 days of calendar year-end. § 240.13d-1(b), (d).	Change in beneficial ownership of more than 5%, otherwise annually for any other change. § 240.13d-2(b), (c).	Within 10 days of month end, otherwise within 45 days of calendar year-end. § 240.13d-2(c).
Schedule 13G (Passive Investors)	Within 10 days of acquisition. § 240.13d-1(c).	Change in beneficial ownership of more than 5%. § 240.13d-2(b), (d).	"[P]romptly." § 240.13d-2(d).

In the simplest terms, the investor who files on a Schedule 13D must include more detailed information on the filing and is required to amend the filing more frequently than an equivalent position reported on a Schedule 13G. Given these differences, the next Part takes a closer look at why investors may try to take advantage of the short-form schedule.

II. THE CASE FOR EXISTENCE OF 13G FILING MISUSE

Part I of this Note laid the groundwork for understanding the current beneficial ownership reporting scheme. Part II investigates the advantages and disadvantages associated with an active investor improperly filing a Schedule 13G and posits that such misuse potentially yields numerous benefits for investors while posing limited risk. Section II.A investigates negative market impacts which may develop because of filing misuse. Such harms suggest that intentional misuse of the 13G filing (if it is indeed occurring) is worthy of regulators' attention. Section II.B investigates the ease at which misuse may occur, notably given the subjective aspect and difficulties of proof when it comes to an investor's true intent. Sections II.C and II.D investigate the costs and benefits to investors who choose to improperly file a Schedule 13G.

A. *Why It Matters: The Negative Impacts from Filing Misuse*

The availability of the short-form 13G filing option opens the possibility that investors will "intentionally structure their acquisition strategies to exploit the gaps created by the current reporting regime, to their own short-term benefit and to the overall detriment of market transpar-

ency and investor confidence."[64] As discussed previously, the SEC included the passive investor exemption under Schedule 13G so that markets could more easily digest which acquisitions were likely to cause possible shifts in corporate control.[65] This purpose is undermined by individuals who harbor activist intentions yet masquerade as passive investors, thereby reducing the efficacy of the 13D and 13G reports.[66] This can be seen through an extreme example. Assume there is a high degree of Schedule 13G misuse by filers (so that many truly active investors choose to report only on the short-form filing). This would in effect create a reporting regime where the market assumes every filing (regardless of whether it is a Schedule 13G or 13D) is evidence of future control changes.[67] Little information would be gleaned from the investor's choice to file either a 13G or 13D filing, as markets would discount the truthfulness of an investor's self-professed passivity.[68] Moreover, markets would be in a worse position than pre-1977 (when the short-form option was introduced), as the 13G filing requires even less information to be disseminated to the public than the formerly mandated 13D filing.[69] Therefore, the propensity for misuse in this area should be seen as substantially important to

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64. WLRK, supra note 46, at 2. Although the WLRK petition was speaking specifically about abuse of the 13D ten-day filing window, an easy parallel can be drawn to possible abuses of the 13G filing rules.

65. See supra text accompanying note 58 (detailing SEC intention with respect to Schedule 13G passive investor exception).

66. In addition to limiting investors' market knowledge, the systematic abuse of the 13G filing may impact scholarly analysis as well. Several recent economic analyses have relied on the accuracy of 13D and 13G filings to denote the true intent of the investor. See, e.g., Christopher P. Clifford, Value Creation or Destruction? Hedge Funds as Shareholder Activists, 14 J. Corp. Fin. 323, 329 (2008) (using sample of activism campaigns and documenting statistically significant market-adjusted returns between passive investments (approximated through 13G filings) and active investments (approximated through 13D filings)); Alex Edmans, Vivian W. Fang & Emanuel Zur, The Effect of Liquidity on Governance, 26 Rev. Fin. Stud. 1443, 1452 (2013) (analyzing whether liquidity reduces or improves likelihood that security holder governs through "voice" (approximated through 13D filings) or "exit" (approximated through 13G filings)); Alon Brav, Wei Jiang & Hyunseob Kim, The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes 4–5 (Nat'l Bureau of Econ. Research, Working Paper No. 17517, 2011), http://www.nber.org/papers/w17517.pdf [http://perma.cc/43AY-V6KC] ("[W]e utilize a legal feature in ownership disclosure as the source of identification. Specifically, we measure the performance of firms for which . . . the fund switched from a 13G to a 13D filing, which indicates that the fund switched from a passive to an activist stance." (footnote omitted)). Uncovering misuse of these filings may impact the accuracy of such analyses.

67. See infra note 109 and accompanying text (discussing evidence this impact is already apparent in markets).

68. See infra section II.C.2 (discussing this and other possible market reactions to filing of 13Gs).

69. For instance, the 13D filings require a detailed explanation of the investor's intentions with respect to control of the company, which the 13G filing does not require. See supra section I.B (detailing this and other differences between long-form 13D and short-form 13G).

policymakers and warrants the sort of empirical inquiry provided by this Note in order to determine how serious the problem may be.

B. *The Problem of Subjectivity and the Ease of Misuse*

Many investors who hold securities under a passive investor exception for the Schedule 13G filing will, at some point, face the question of whether (and when) to switch to the Schedule 13D.[70] Ignoring for current purposes any rule-based ownership thresholds, the ultimate question for determining whether an investor must switch from a 13G to a 13D filing is this: What is the purpose for which the investor holds the securities?[71] If the investor holds the securities for the purpose of effecting change or influencing the control of the issuer, then a Schedule 13D is required. But because this is a highly subjective standard, an investor who internally harbors activist intentions may be tempted to improperly file a Schedule 13G while quietly planning (or even discretely acting on) its activist intentions.

Normally proving such misuse of the 13G filing option would require a targeted analysis of the investor, likely done through extensive discovery in litigation.[72] Plaintiffs or prosecutors immediately face an evidentiary hurdle here, as it may be impossible to definitively prove the investor's subjective state of mind, and plaintiffs must instead rely on external actions as indicia of a truly activist intent.[73] One such action would be an attempt to gain control over or representation on the issuer's board through the waging of a proxy contest by an investor still under a 13G filing. Such an action would be a red flag for civil litigants and the SEC that the 13G filings were at best inaccurate and at worst intentionally misleading.

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70. Charles Penner, When to Switch a 13G Filing to a 13D Filing, Activist Investing, Schulte, Roth & Zabel 1 (Spring 2005), http://www.srz.com/files/News/2e894071-4b5d-4641-9d91-225c5a0b073f/Presentation/NewsAttachment/669dbd02-3860-4d52-bd64-290671aee7f2/ai-spring-05-penner.pdf [http://perma.cc/39T2-96TK].

71. Id.

72. Several older cases highlight such an analysis in challenges to investor 13D filings that indicated the investors were holding the investment passively (these cases were adjudicated prior to the adoption of a passive exception for 13G filings). See Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 696–97 (2d Cir. 1973) (looking at defendant's previous practice of acquiring firms after initial small investments and relative size of defendant's commitment to other investments in order to confirm acquirer failed to disclose control purpose in 13D filing); Transcon Lines v. A.G. Becker Inc., 470 F. Supp. 356, 377–78 (S.D.N.Y. 1979) (tracing history of investor holdings through numerous meetings, phone calls, and memos over several years to disprove filing statement that investor had no control purpose in investment).

73. See Chad S.C. Stover, Best Practices in Proving Specific Intent and Malice, ABA Section of Litigation Annual Conference, Apr. 9–11, 2014, at 1–2, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/best_practices.authcheckdam.pdf [http://perma.cc/EGV9-TAHF] (noting "[p]roving intent in either the civil or criminal context is inherently difficult" and, absent rare case where defendant admits intention, prosecutor or plaintiff must rely on circumstantial evidence).

However, not all corporate governance-related actions can be taken as per se evidence of activist intent. For example, nothing in the rules or statute explicitly precludes Schedule 13G filers from exercising their voice when it comes to voting on corporate matters.[74] One court recently suggested that a Schedule 13G filer could even vote for a dissident slate in a proxy contest and still be considered a passive investor for the purposes of Rule 13d-1(c).[75] Other actions may toe the line between passive and activist intents. Consider, for instance, Rule 14a-8 shareholder proposals. The SEC has noted that solicitations regarding social or public interest issues would not disqualify an investor from filing a 13G schedule.[76] Other corporate governance proposals "may or may not be control related" based on the circumstances.[77]

Courts have long recognized that there exists a very gray area between a tentative plan or desire and a sufficiently concrete plan that requires disclosure.[78] Because it will be difficult to distinguish between investors—the "good" investor who legitimately harbors no present activist intent and the "bad" investor who simply wants to benefit from the market's ignorance—there is little incentive for the bad investor to file a 13D before he is fully ready to perform publicly available and objectively activist actions. That filing thus may only come well after the investor has accumulated a large ownership interest in the target company.[79]

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74. The only restrictions on corporate voting under the rules apply through the ten-day safe-harbor provision, which triggers only when a 13G filer switches to 13D filing (either by choice or by surpassing the twenty percent threshold). 17 C.F.R. § 240.13d-1(e)–(f) (2015).

75. Third Point LLC v. Ruprecht, No. 9469-VCP, 2014 WL 1922029, at *20 n.37 (Del. Ch. May 2, 2014) (holding there are no restrictions on Schedule 13G filer who wants to vote for dissident slate, and noting specifically "there is no evidence that a Schedule 13G filer would have to file a Schedule 13D"). For a detailed analysis of the *Third Point* case, see infra notes 116–126 and accompanying text.

76. See Exchange Act Release No. 39538, supra note 55, at 604 ("[E]ligibility to use Schedule 13G by a shareholder who submits, supports, or engages in exempt soliciting activity in favor of a shareholder proposal submitted pursuant to Rule 14a-8, will depend on whether that activity was engaged in with the purpose or effect of changing or influencing control of the company.").

77. Id.

78. See Tracinda Corp., Exchange Act Release No. 58451, 94 SEC Docket 21, 22 (Sept. 3, 2008) (finding violation of section 13(d), as party's Schedule 13D announced sale of fourteen million shares but did not disclose original sell offer was for twenty eight million shares, the rest of which were sold subsequent to filing); see also Eleazer Klein & Ariana Schwartz, Section 13 Disclosure Issues 3–4, *in* Disclosure and Reporting Under Sections 13 and 16: Groups and Swaps Post-CSX (Jan. 13, 2009), Schulte, Roth & Zabel, http://www.srz.com/files/Event/8f67a5c9-6688-4573-baaa-4ce1c069ab9c/Presentation/EventAttachment/2862f03d-0818-4f90-85bc-28d97961d717/Disclosure%20and%20Reporting%20Booklet%20with%20PPT.pdf [http://perma.cc/J7X6-859K] (discussing same SEC administrative decision).

79. For an example of an investor utilizing such a tactic, see infra notes 93–98 and accompanying text.

C. *Benefits to Investors from Choosing to Misuse*

1. *Schedule 13G and the Surprise Attack.* — The obvious strategic benefit to staying on a 13G filing for as long as possible is a "surprise attack."[80] Activists can fly under the radar, planning to effect large changes to the issuer and even acquiring up to twenty percent ownership interest at a relatively low price, all while maintaining that their intent is still "passive." A recent allegation of a surprise attack emerged in the attempted acquisition of pharmaceutical company Allergan by the joint efforts of hedge fund Pershing Square and interested buyer Valeant.[81] Allergan sued both the hedge fund and the buyer for this tactic, alleging that defendants carefully designed their purchase program to avoid required disclosure under Rule 13d-1 and arguing defendants' "failure to adequately describe and attach documents required to be included in Schedule 13D suggests an effort to conceal their true intentions."[82] A shell fund created by Pershing Square quickly bought up shares of Allergan in the ten-day window before a Schedule 13D was required.[83] In the complaint, Allergan alleges that the fund originally stopped its purchases when it reached 4.99% ownership in an attempt to avoid reporting requirements.[84] After letting prices settle for two days, the hedge fund began its buying spree in earnest, reaching an ownership of 9.7% by the time the first 13D was filed.[85] Although this surprise attack did not utilize a 13G filing abuse, an active investor who instead chooses to file a Schedule 13G could conceivably reach an even greater ownership level—acquiring up to 20% while under the passive investor exception before announcing a change to an activist stance.[86] As these

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80. See Thomas W. Briggs, Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis, 32 J. Corp. L. 681, 691 (2007) ("[W]ith no 'purpose' disclosure and only annual ownership disclosure, who can really tell what is going on until, as at Pearl Harbor, it is too late?"); see also Marcel Kahan & Edward B. Rock, Hedge Funds in Corporate Governance and Corporate Control, 155 U. Pa. L. Rev. 1021, 1077 (2007) ("In many of the battles between managers and hedge funds described earlier, the shareholder base of companies can change almost overnight, with hedge funds sometimes ending up with more than 50% of the shares.").

81. See Liz Hoffman & David Benoit, Allergan Questions Ties Between Valeant and Ackman, Wall St. J. (Aug. 1, 2014, 5:30 PM), http://online.wsj.com/articles/allergan-files-suit-versus-valeant-pershing-1406908244 (on file with the *Columbia Law Review*) ("Allergan is asking a judge to rule that Pershing Square and Valeant violated . . . disclosure laws and to order the unwinding of Pershing Square's purchase of much of its Allergan stake.").

82. Complaint for Violations of Securities Laws at 30, Allergan, Inc. v. Valeant Pharm. Int'l, Inc., No. 814CV01214 (C.D. Cal. Nov. 4, 2014), 2014 WL 3809192.

83. Id. at 23.

84. Id. 4.99% falls just below the five percent threshold under which the filing of a 13D or 13G (if applicable) is mandated. 17 C.F.R. § 240.13d-1(a) (2015).

85. Complaint, supra note 82, at 23.

86. The main disadvantage of this tactic (besides its illegality) is that the mere announcement of an ownership interest (even under a 13G) may be cause for scrutiny, particularly for a notable hedge fund like Pershing Square. See infra notes 110–112 and accompanying text (discussing this tendency). The investor would also be unable to race

purchases are done without public notice, the creeping acquirer can avoid paying any control premium for the stock.[87]

On the other hand, an activist who properly files a detailed Schedule 13D after forming an activist intent can face increased economic costs. Most obviously, disclosing a large buying interest in the market may push stock prices up, as market makers react to this increased demand by raising ask prices.[88] Additionally, a Schedule 13D can be "like blood in the water,"[89] as other investors tend to follow filings closely and may start buying up shares (thus pushing prices up) if they feel there will be a stock price premium paid during the succeeding fight for control.[90] The large number of 13D tracking websites,[91] which provide readers with information about recent 13D filings by prominent investors, supports the notion that these filings can prompt copy-cat investor behavior. A beneficial strategy may therefore demand withholding information from the marketplace for as long as practicable.[92]

The benefits of such filing tactics can be seen through past allegations of securities filings misuse brought by private plaintiffs. Referring back to this Note's introduction,[93] one example of such an alleged misuse was seen in ESL's purchase of shares in Sears to effectuate a merger with

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to buy more shares after switching to Schedule 13D, as the cool-down provision under section 13d-1(f)(2) forbids acquiring additional ownership interest from the time the investor crosses the threshold until ten days after the 13D has been filed. 17 C.F.R. § 240.13d-1(f)(2)(ii).

87. For a discussion of control premiums, see supra note 40.

88. See Lawrence R. Glosten & Paul R. Milgrom, Bid, Ask and Transaction Prices in a Specialist Market with Heterogenously Informed Traders, 14 J. Fin. Econ. 71, 97–98 (1985) (advancing seminal theory of micro-market structure in which market makers increase bid-ask spread to protect against receiving trade orders from informed traders).

89. Brian Schaffer, Another Difference Between 'D' and 'G' Is More than Just the Obvious, Unboxed Thoughts (Aug. 11, 2011), http://www.unboxedthoughts.com/2011/08/11/another-difference-between-%E2%80%98d%E2%80%99-and-%E2%80%98g%E2%80%99-is-more-than-just-the-obvious/ [http://perma.cc/373Y-898G].

90. See Doug McIntyre, Digging in to 13D Disclosures, Investopedia, http://www.investopedia.com/articles/stocks/07/13d.asp [http://perma.cc/LK7J-MQP2] (last modified May 21, 2015) (noting 13D disclosures often precede "change of management control, a breakup of the company, an increase in stock price, or a sale of the company" and "can provide opportunities for diligent investors").

91. See, e.g., 13D Monitor, http://13dmonitor.com/ [http://perma.cc/J4B6-JM7P] (last visited Sept. 14, 2015); Activist Insight, http://www.activistinsight.com/ [http://perma.cc/ZA6L-3NPT] (last visited Sept. 14, 2015); StreetInsider.com 13D Tracker, http://www.13dtracker.blogspot.com/ [http://perma.cc/BR8H-T8BA] (last visited Sept. 14, 2015); Whalewisdom, http://whalewisdom.com/ [http://perma.cc/8QJZ-RKMR] (last visited Sept. 14, 2015).

92. The plaintiffs in *Allergan* alleged this very tactic, arguing that from the time defendants' purchases began until the day Valeant announced its proposed purchase, the stock prices defendants paid were well below the price that shares jumped to once Valeant's true intentions were revealed. See Complaint, supra note 82, at 23.

93. See supra notes 1–10 (describing example case).

Kmart.[94] ESL, which is controlled by activist investor Edward Lampert, made a substantial investment in Kmart after its bankruptcy filing in January 2002, acquiring a beneficial ownership of a majority of Kmart's outstanding common stock and placing Lampert as Chairman of the Board.[95] Negotiations between Sears and Kmart commenced on October 21, 2004, and the merger was signed by November 17, 2004,[96] yet ESL maintained its 13G passive position for its holdings of Sears shares throughout the negotiation process.[97] By the time a Schedule 13D was filed for the Sears holdings, two days *after* the merger was signed, "[t]he acquisition was already an accomplished fact."[98]

Another example of alleged filing abuse can be found in the bidding war between NACCO Industries, Inc. and Harbinger (a hedge fund) over Applica (a holding company).[99] While NACCO and Applica were negotiating a merger agreement in early 2006, Harbinger quietly increased its holdings in Applica while claiming a passive intent.[100] And although Harbinger amended its 13G filings to reflect the growing ownership interests, it did not switch to a 13D filing until it surpassed the twenty percent threshold.[101] Even then, in all of its Schedule 13D filings up until offering its competing bid, Harbinger repeatedly claimed it was holding shares for investment purposes only and did not state an intention to take over control of Applica.[102] Harbinger did eventually file an amended Schedule 13D that stated its activist intentions, but only on the same day it offered the competing bid.[103] NACCO, in its suit challenging Harbinger's successful tender offer, claimed that "in reliance on Harbinger's Schedule 13D filings . . . NACCO believed that Harbinger

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94. Levie v. Sears Roebuck & Co., 676 F. Supp. 2d 680 (N.D. Ill. 2009).

95. See Kmart Holding Corp., Joint Proxy Statement-Prospectus 37 (2005), http://www.sec.gov/Archives/edgar/data/1310067/000104746905004282/a2152336z424b3.htm [http://perma.cc/PU4K-YEVP] (describing ESL's investment in Kmart post-bankruptcy and Lampert's designation as chairman with control over ESL).

96. Id. at 39–44 (describing timing of negotiations).

97. See Sears, Roebuck & Co., supra note 7 (indicating switch from Schedule 13G to Schedule 13D on cover page).

98. Briggs, supra note 80, at 700. The subsequent litigation over this tactic was resolved on a motion for summary judgment against the plaintiffs. The judge found that the first evidence of ESL's involvement was on November 13, 2004, and therefore ESL's filing of a 13D within the next ten days was timely and not a violation of section 13(d) or section 10(b). *Levie*, 676 F. Supp. 2d at 689. The judge noted all negotiations prior to November 13 were taken on by Lampert in his capacity as CEO of Kmart and not on behalf of ESL. Id.

99. NACCO Indus., Inc. v. Applica Inc., 997 A.2d 1 (Del. Ch. 2009).

100. Id. at 6–11.

101. Id. at 9.

102. Id. at 12.

103. Id. at 11.

would not make a competing bid or seek to influence the outcome of the merger vote."[104]

A final example of the benefits from alleged Schedule 13G misuse can be seen in the dispute over Preheat, Inc., an oilfield business.[105] The plaintiffs in the case were the former sole shareholders of Preheat, Inc., which plaintiffs sold to Omni Energy Services Corporation on December 29, 2005, through a Stock Purchase and Sale Agreement (SPSA).[106] The plaintiffs' complaint included an allegation that several named defendants concealed their intentions to exert future control over Omni and replace its Board members.[107] Plaintiffs argued that the filing of a Schedule 13G on September 22, 2004, was itself a material misrepresentation of activist intent and a violation of section 13(d) and asserted they would not have agreed to the sale had they known the true intentions of the defendants.[108]

These three cases exemplify how allegedly inappropriate 13G filings can bring great harm to the issuer or other investors relying on the supposed truthfulness of a passive filing, yet on the other hand, significant benefits to the filer in achieving activist goals.

2. *When the 13G Surprise Attack Is Not So Surprising.* — Despite the examples given above, some market watchers might give little weight to whether the investor files a 13G or 13D, and as such the filing of either schedule could lead to an increase in prices. For instance, Seeking Alpha, a web-based equity research website, makes no differentiation between the different "intents" behind the two filings during its weekly review of both filings, noting both "13D/Gs are often a precursor to a hostile takeover, company breakup or other 'change of control' events."[109] When

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104. Id. The Delaware state court ultimately found that NACCO's claim was sufficiently pled to state a common-law fraud claim, though explicitly noted that any claim asserting a violation of section 13 of the Exchange Act "could be heard only by a federal court" and so the court "would not be able to consider it." Id. at 25.

105. Rhyne v. Omni Energy Servs. Corp., No. 08-CV-00594, 2009 WL 1844474, at *1, *3 (W.D. La. June 23, 2009).

106. Id. at *1.

107. Id. at *3.

108. Id. at *11. The judge ultimately determined that the defendants' later filings did sufficiently indicate an activist intent and gave plaintiffs enough notice of this intent before the sale was finalized. Id. at *12 ("SEC filings made prior to the plaintiffs' sale . . . indicate a clear intent by [defendants] to obtain a controlling interest in OMNI, and at the time of the SPSA, [defendants'] controlling interest in OMNI was easily discerned.").

109. Last Week's 13D/G Filings by Leading Fund Managers in Healthcare and Technology, Seeking Alpha (May 16, 2013, 12:38 PM), http://seekingalpha.com/article/1440591-last-weeks-13d-g-filings-by-leading-fund-managers-in-healthcare-and-technology [http://perma.cc/6LHV-TG4W]; see also Institutional 5% Ownership Filings Last Week by Leading Funds, Seeking Alpha (Dec. 6, 2011, 10:30 AM), http://seekingalpha.com/article/312097-institutional-5-percent-ownership-filings-last-week-by-leading-funds [http://perma.cc/4LMY-97RP] (reciting same language); Noteworthy Institutional 5% Ownership Filings This Week, Seeking Alpha (Mar. 8, 2012, 2:31 PM), http://seekingalpha.com/article/420931-noteworthy-institutional-5-percent-ownership-filings-this-week [http://perma.

a 13G filing does elicit the same price jump as a 13D filing, markets may either assume: (1) the 13G filer will likely harbor activist intentions in the future, or (2) the filer already does harbor such intentions but is inappropriately relying on the passivity-indicating Schedule 13G. The first option implicates no illegal conduct, while the opposite holds true for the second.

However, there is a third explanation for a price jump following a 13G filing: Stock prices may be likely to increase following *any* sort of ownership filings by well-known and successful hedge funds.[110] To market watchers, it may make little difference whether the funds file a 13G or 13D filing, as the simple act of investment by esteemed funds may suggest the issuer is a worthy target for investment.[111] As the filings are only required after meeting a five percent ownership interest, both a 13G and a 13D reflect the owner's heavy investment into (and therefore assumed confidence in) the company.[112] This suggests that a very notable and highly scrutinized hedge fund may have little incentive to abuse a 13G filing in order to effectuate a "surprise attack," as its efforts to acquire stock at depressed prices will be quickly foiled.[113] Lesser-known or smal-

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cc/WL4V-JE93] [hereinafter Seeking Alpha, Noteworthy Filings Mar. 8, 2012] (noting "13-D and 13-G filings often are a precursor to a hostile takeover, company breakups and other 'change of control' events").

The statement that the market already discounts the truthfulness of 13G filings may appear to conflict with one of the theories of this Note—that misuse of 13G filings can fool other investors and thus causes harm. However, the *potential* for *some* investors to be fooled is sufficiently troublesome to demand attention.

110. This can be explained in part by the important role played by well-known hedge funds as large shareholders of target companies. See Andrei Shleifer & Robert W. Vishny, Large Shareholders and Corporate Control, 94 J. Pol. Econ. 461, 463–65 (1986) (finding large shareholders raise expected profits for smaller shareholders through monitoring of management and facilitation of third-party takeovers).

111. Recent economic analyses have shown positive returns to stocks following hedge fund activism, supporting the proposition that the mere act of an activist hedge fund investing in a company might entice others to invest as well. See, e.g., Lucian A. Bebchuk, Alon Brav & Wei Jiang, The Long-Term Effects of Hedge Fund Activism, 115 Colum. L. Rev. 1085, 1106 (2015) (finding "clear patterns of improved operating performance . . . during the five years following activist interventions"); April Klein & Emanuel Zur, Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors, 64 J. Fin. 187, 188 (2009) (finding "significantly positive market reaction around the 13D filing date, a further significant increase in share price over the subsequent year, and the activist's success in achieving its original objective"). Another analysis found that 13G filings also produced abnormally high returns, although 13D returns were comparatively larger. Clifford, supra note 66, at 329 (using sample of activism campaigns by U.S. hedge funds from 1998–2005 and documenting statistically significant market-adjusted returns of 1.64% (for passive filings) and 3.39% (for active filings) around disclosure date).

112. Seeking Alpha, Noteworthy Filings Mar. 8, 2012, supra note 109 ("[B]y virtue of their 5% ownership in public companies, the information contained in the 13-D and 13-G filings indicates only high confidence or high conviction moves by institutions and insiders . . . .").

113. They could still, however, benefit in non-economic ways, such as reduced regulatory scrutiny.

ler funds, on the other hand, could greater benefit from reliance on inappropriate 13G filings. These funds likely would not attract public scrutiny before the switch, and so could garner the economic benefits from keeping prices low.[114]

3. *Schedule 13G and 13D in the Shareholder Rights Plan and Antitrust Contexts.* — There can be other benefits to a 13G filing outside of the surprise attack strategy. One such benefit recently appeared in the shareholder rights plan context.[115] A recent Delaware case concerned defendant Sotheby's adoption of a rights plan in October 2013 that would trigger at a lower percentage of ownership for 13D filers than for 13G filers.[116] This two-tiered structure, which became a main focus in the litigation, allowed a 13G filer to acquire up to twenty percent interest in Sotheby's without triggering the rights plan, whereas a 13D filer could only acquire up to ten percent before the plan was triggered.[117] The Board put this protectionist measure in place because the board members felt the recent trading activity by activist hedge funds in Sotheby's stock—particularly by activist investor Third Point—presented legally cognizable threats[118] to the corporation.[119] Third Point, as lead plaintiff in the challenge, alleged that adoption of the plan violated the Board's fiduciary duties, as the plan created an impermissible advantage to the incumbent directors in a proxy battle and was discriminatory in nature due to its distinction between passive and activist investors.[120] Interestingly, plaintiffs noted a possible misuse of the 13G filing when discussing the increased activity of hedge funds on July 19, 2013. William F.

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114. This suggests that regulators would be better served focusing on smaller hedge funds for signs of misuse, rather than the large, prominent market-leading funds. See infra section IV.A (proposing targeted areas for increased regulatory scrutiny).

115. A shareholder rights plan, also known as a poison pill, is a defensive tactic utilized by a board of directors of a company to ward against a takeover, forcing the bidder to negotiate with management directly in order to remove the plan instead of directly transacting with shareholders to gain a controlling interest. See generally Marie Baca, What Is a Poison Pill?, CBS Money Watch (Aug. 15, 2008, 1:55 PM), http://www.cbsnews.com/news/what-is-a-poison-pill/ [http://perma.cc/9GB4-NSVL] (discussing history and application of poison pill). For a brief overview of the legal obligations a board faces when choosing to put such protective measures in place, see generally Anthony Augliera, Note, Shareholder Rights Plans: Saying No to Inadequate Tender Offers, 57 Fordham L. Rev. 803, 809–13 (1989).

116. Third Point LLC v. Ruprecht, No. 9469-VCP, 2014 WL 1922029, at *1 (Del. Ch. May 2, 2014).

117. Id. at *22–33.

118. Under the first prong of the *Unocal* standard, which courts use to assess the appropriateness of a rights plan, the adoption of the plan must be "reasonable." Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985). This means "defendants must actually articulate some legitimate threat to corporate policy and effectiveness." Air Prods. & Chems. Inc. v. Airgas, Inc., 16 A.3d 48, 92 (Del. Ch. 2011).

119. *Third Point*, 2014 WL 1922029, at *1.

120. Id. Third Point and Sotheby attempted to avoid the battle, negotiating to increase the percentage threshold which would trigger the plan or to waive the threshold entirely, but the parties could not come to an agreement. Id. at *26–31.

Ruprecht, the President and CEO of Sotheby's and Chairman of the Board, "noted that Morgan Stanley recently had announced a '*passive*' 5.1% stake in Sotheby's, but that such a stake might be a front for one or more funds . . . wishing to obtain as large an interest as possible in the Company 'before announcing their intentions, probably through a 13D filing.'"[121]

The plan was ultimately upheld by the Delaware Chancery Court, which denied Third Point's motion to obtain a preliminary injunction to remove the rights plan.[122] The court noted that the rights plan was not so impermissibly "disproportionate"[123] to make it unlawful.[124] The court acknowledged that the plan may be "discriminatory" in the literal sense that it treated two filers differently.[125] However, the court noted that the plan "arguably is a 'closer fit' to addressing the Company's need to preventing an activist or activists from gaining control than a 'garden variety' rights plan that would restrict the ownership levels for every stockholder, even those with no interest in obtaining control or asserting influence."[126]

These sorts of plans are not uncommon among other corporations. Professor John Coffee, an expert witness in the trial, noted in his report that some seventy-three corporations have adopted shareholder rights plans that distinguish between passive and active investors, allowing higher ownership levels for the passive investors.[127] Future investors who hope to avoid the ire of a protective board may be inclined to stay on a 13G filing for as long as possible in order to accumulate more stock and avoid a plan triggering. At the point where they have a relatively larger ownership interest in the company (19.9% under a 13G filing instead of 9.9% under a 13D filing[128]), the investor may have more bargaining power in negotiations to remove the pill. This tactic may become more

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121. Id. at *3 (emphasis added). The fact that this abuse was theorized and discussed by high-level management lends support to this Note's assertion that such abuse not only exists in the markets but impacts the confidence of market participants in the efficacy of the SEC reporting requirements.

122. Id. at *1.

123. Under the second prong of the *Unocal* standard, the court must decide whether the Board's actions in adopting the plan fell "within a range of reasonable responses to the threat," meaning that the response was not disproportionate to the risks posed. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995).

124. *Third Point*, 2014 WL 1922029, at *20–21.

125. Id. at *20.

126. Id.

127. Coffee, supra note 40. Professor Coffee further explained that such 13G/13D "discriminatory" rights plans "date back to 1986 when United Continental Holdings did it first; the most recent such adoption was by Avid Technology in January 2014." Id.

128. This example assumes the same thresholds as those set in the Sotheby's rights plans. See supra note 117 and accompanying text.

prevalent in the near future, given the recent rise of "raider-like activism" perceived in the market for corporate control.[129]

There are also related benefits to the filer through the "passive investor exemption" carved out for merger approvals in the antitrust context.[130] Under the Hart-Scott-Rodino (HSR) Act,[131] parties to certain acquisitions of voting securities are required to file notification with the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) as well as observe a waiting period in which the parties must seek approval to acquire more stock.[132] A relevant exception to these reporting requirements are "acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer."[133]

The FTC and DOJ have interpreted the HSR passive investor exemption "extremely narrowly," requiring the investor to do little more than vote its shares.[134] Therefore, the investor who attempts to skirt the HSR Act must avoid such actions as nominating a candidate for the Board of Directors of the issuer; proposing corporate action requiring shareholder approval; soliciting proxies; and having a controlling shareholder, director, officer, or employee simultaneously serving as an officer or director of the issuer.[135] Admittedly, nothing in the HSR Act explicitly ties the passivity of the investor as to whether it files a Schedule 13G or 13D.[136] However, an investor's choice to file a 13D instead of a 13G (if eligible)

129. See Francis J. Aquila & Melissa Sawyer, Keeping Current: Poison Pills Find New Life as "Raider-Like" Activism Is On the Rise, Bus. L. Today, Sept. 2014, at 1 ("[W]ith the rapid increase in 'raider-like' activism, many corporate boards are again recognizing the potential usefulness of poison pills.").

130. See generally Malcolm R. Pfunder, Shareholder Activism and the Hart-Scott-Rodino Act Exemption for Acquisitions of Voting Securities Solely for the Purpose of Investment, 20 Antitrust 74, 74 (2006), http://www.gibsondunn.com/fstore/documents/pubs/Pfunder-ShareholderActivism-Antitrust07.06.pdf [http://perma.cc/3H5E-7KEL] (discussing passive investor exemption).

131. Hart-Scott-Rodino Antitrust Improvements (HSR) Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified in scattered sections of 15 U.S.C. (2012)).

132. 15 U.S.C. § 18a(a)–(b).

133. Id. § 18a(c)(9). Note that the threshold put in place under the antitrust laws is ten percent lower than the threshold under securities law, which requires a passive 13G filer to change to a 13D filing only after reaching twenty percent ownership. 17 C.F.R. § 240.13d-1(c)(3) (2015).

134. Pfunder, supra note 130, at 74 (citing ABA Section of Antitrust Law, Premerger Notification Practice Manual 21–23 (3d ed. 2003)).

135. See Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,465 (July 31, 1978) (providing guidance as to "certain types of conduct" likely to be viewed as "evidence of an intent inconsistent with investment[-only] purpose"). The SEC has not provided such explicit guidance in the beneficial ownership reporting area.

136. See 15 U.S.C. § 18a(c)(9) (omitting any discussion of impact of 13D or 13G filing on passive investor exception); Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. at 33,465 (same).

would certainly suggest they may have future activist intentions for the target company.[137] For this reason, an investor who would like to avoid raising the attention of federal antitrust regulators—as well as the burdens associated with those antitrust filings and waiting periods—may choose to stay on a 13G long after they have formed an activist intent.[138]

D. *Risks Investors Face from Choosing to Misuse*

Hypothetically, the consequences for filing a Schedule 13G where a 13D is required could carry substantial penalties, either through private civil litigation or through enforcement actions taken by regulators. However, it is important to emphasize that the SEC has not taken an active role in policing and punishing misuse of the 13G filing,[139] and private liti-

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137. See Pfunder, supra note 130, at 75 ("[A] shareholder's decision to file a Form 13D rather than a Form 13G would strongly suggest a more activist intention, at least with respect to that shareholder's future relationship with management of the issuer."). The 13D filing would also require the investor to detail its investment purposes, providing the federal antitrust regulators with specific evidence of activist intent. See supra notes 45–47 and accompanying text (describing Schedule 13D filing requirements).

138. Plaintiffs in the *Allergan* case alleged a similar attempt by defendants to design a purchasing scheme to exploit regulatory gaps in order to avoid antitrust and securities disclosure requirements. See Complaint, supra note 82, at 23 ("Just shy of the 5% reporting threshold under Section 13(d), these purchases also allowed Valeant to avoid antitrust disclosure requirements."). This tactic was allegedly utilized in order to limit the market's knowledge of their true intent and therefore keep prices low during a subsequent buying spree. Id. ("[I]n order to profit from Valeant's material nonpublic information at the expense of Allergan's stockholders, the Pershing Defendants accumulated shares rapidly at costs well below the post-announcement share price.").

139. The SEC has brought or been a part of several actions related to 13G filings, but such actions are not directly related to issues raised in this Note.

The closest the SEC has come to bringing such an action was a 2009 case against an investment advisor. See Latham & Watkins Corp. Dep't, Merger Arbitrage, Beneficial Ownership Reporting and Proxy Contests: Reflections on the Commission's *Perry* Order, Client Alert, Oct. 1, 2009, at 1–2, http://www.lw.com/thoughtLeadership/merger-arbitrage-beneficial-ownership-reporting-and-proxy-contests [https://perma.cc/TZ4Q-LDZW] (summarizing 2009 SEC enforcement action against advisor relying on 13G filing while using "Merger Risk Arbitrage" tactic to take advantage of larger filing window for 13G institutional investors over other 13D filers). Note, however, that the defendant in this action was an investment advisor under the forty-five-day 13G filing, not a self-proclaimed passive investor as is the focus of this Note.

Additionally, the SEC has recently brought a series of charges against repeated late filers of 13Gs and 13Ds; however, this seems targeted at inadvertent tardiness rather than the sort of intentional misuse of the filings discussed here. See Press Release, SEC, SEC Announces Charges Against Corporate Insiders for Violating Laws Requiring Prompt Reporting of Transactions and Holdings (Sept. 10, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678#.VKL6bV4CUA [http://perma.cc/HJD8-JP4A] (announcing charges for violations of Schedule 13D and 13G ownership reports stemming from failure to promptly report information about stock holdings and transactions).

Finally, the SEC did not directly participate in a case against senior executive officers who attempted to claim passivity under a 13G filing, but did file an amicus brief stating its position that officers or directors would not be eligible to utilize the 13G filing.

gants face several hurdles to succeeding in their claims.[140] Therefore, the severity of the downside risks from misusing the filing can be discounted by the low probability of occurrence.

One of the drivers for such a low probability of punishment is that neither shareholders nor issuers have access to a private damages remedy for violations of section 13(d) reporting requirements; such a right of action was not explicitly created under section 13(d), nor have courts been willing to imply such a right.[141] Without a damages remedy, the likelihood of private suits is greatly diminished.[142] And without a strong policing presence by the SEC, there is no one left to bring such claims. Private plaintiffs do have the ability to sue for injunctive relief,[143] though the benefits of earning injunctive relief (i.e., forcing the company to amend its filings) may not be worth the cost of a lawsuit without the chance of recovering a cash payout.

A general private remedy for all securities filing violations can be found under section 18(a), which allows persons who transact in securities based on false or misleading reporting under any SEC rule or regulation to recover damages from the fraudulent reporter.[144] However, plaintiffs face another hurdle in that this remedy is only available "to

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See Brief of the SEC, Amicus Curiae, In Support of the Plaintiff-Appellant on the Issues Addressed at 22 n.18, Edelson v. Ch'ien, 405 F.3d 620 (7th Cir. 2005) (No. 04-1299), 2004 WL 3760475, at *31 n.18 (presuming defendant was precluded from filing Schedule 13G because of his position as chief executive officer, which would make it "difficult, if not impossible" for him to certify he had no intent to influence control of the issuer).

140. See infra notes 141–154 and accompanying text.

141. See, e.g., Hallwood Realty Partners, L.P. v. Gotham Partners, L.P., 286 F.3d 613, 620 (2d Cir. 2002) ("[T]here is no private damages remedy for issuers under § 13(d)."); Liberty Nat'l Ins. Holding Co. v. Charter, 734 F.2d 545, 564 n.41 (11th Cir. 1984) ("[T]he Exchange Act provides for private rights of action expressly in several other places . . . . We may infer from this that when it chose to do so, Congress knew how to create explicitly a private right of action on behalf of the issuer.").

142. See Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, 107 Harv. L. Rev. 961, 968–69 (1994) (detailing discussions by Congress and courts noting importance of private right of action in supplementing enforcement actions by SEC and noting substantial monetary benefits gained by private litigants in return for pursuing case).

143. See GAF Corp. v. Milstein, 453 F.2d 709, 719–20 (2d Cir. 1971) (holding issuer has private cause of action and standing to sue for injunctive relief, as issuer "unquestionably is in the best position to enforce section 13(d)"); E.ON AG v. Acciona, S.A., 468 F. Supp. 2d 537, 549 (S.D.N.Y. 2006) ("[T]he Court of Appeals for the Second Circuit has long found an implied private right of action for both issuers and shareholders to bring claims for injunctive relief under [section 13(d)].").

144. See 15 U.S.C. § 78r(a) (2012) ("Any person who shall make or cause to be made any statement . . . which statement was . . . false or misleading . . . shall be liable to any person . . . who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement . . . ."); see also Motient Corp. v. Dondero, 529 F.3d 532, 536 (5th Cir. 2008) ("Section 18(a) provides the sole basis for a private right of action for damages resulting from a violation of Section 13(d).").

those shareholders who can prove reliance on misleading filings."[145] Proving actual reliance by share purchasers can itself be a high bar for plaintiffs—one that the Supreme Court has recently reaffirmed is lower in some other areas of securities class actions[146]—as plaintiffs must show that they actually read and relied on the false statement and that the statement had a causal connection to the damage sustained by the plaintiffs.[147]

Private plaintiffs can also attempt to bring claims under the anti-fraud provisions section 10(b) of the 1934 Act[148] and SEC Rule 10b-5[149] promulgated thereto, arguing that the failure to file a 13D, or conversely, the filing of a 13G, constituted the making of a materially false or misleading statement.[150] Courts have found that "a plaintiff can point to a violation of section 13(d) as the predicate for a 10b-5 claim."[151] Antifraud liability here stems from the shareholder's duty to disclose if the shareholder had a purpose of acquiring control and had the requisite intent, defined as "'a determination [to acquire control] made with an element of resolve.'"[152] A hurdle to this avenue (relevant to suits under sections 13(d) and 18(a) as well) is the requirement that a complaint alleging securities fraud must meet heightened pleading requirements. These heightened pleading requirements require fraud allegations to be pled with "particularity."[153] These pleading requirements, coupled with the

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145. *Hallwood Realty Partners*, 286 F.3d at 619.

146. See Halliburton v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2417 (2014) (reaffirming class action plaintiffs in private securities fraud actions may rely on rebuttable presumption of reliance adopted in Basic Inc. v. Levinson, 485 U.S. 224, 243–50 (1988)).

147. See Int'l Fund Mgmt. S.A. v. Citigroup Inc., 822 F. Supp. 2d 368, 385 (S.D.N.Y. 2011) (holding reliance under section 18(a) requires pleading "actual reliance," meaning "they actually read and relied on the filed document," and "reliance caused loss to the plaintiff" (internal quotation marks omitted) (quoting In re Alstom SA, 406 F. Supp. 2d 433, 478 (S.D.N.Y. 2005))).

148. 15 U.S.C. § 78j(b).

149. 17 C.F.R. § 240.10b-5 (2015).

150. For examples of such challenges, see Rhyne v. Omni Energy Servs. Corp., No. 08-CV-00594, 2009 WL 1844474, at *11 (W.D. La. June 23, 2009) (alleging defendant's attempt to conceal intent to control issuer by filing 13G amounted to material misrepresentation or omission under Rule 10b-5); Collier v. Aksys Ltd., No. 3:04CV1232(MRK), 2005 WL 1949868, at *6 (D. Conn. Aug. 15, 2005) (claiming defendant's filing of Schedule 13G in lieu of Schedule 13D after passing twenty percent ownership threshold amounted to material misstatement or omission under Rule 10b-5), aff'd, 179 F. App'x 770 (2d Cir. 2006).

151. Vladimir v. Bioenvision Inc., 606 F. Supp. 2d 473, 491 (S.D.N.Y. 2009), aff'd sub nom. Thesling v. Bioenvision, Inc., 374 F. App'x 141 (2d Cir. 2010).

152. Id. (alteration in *Vladimir*) (quoting Azurite Corp. v. Amster & Co., 52 F.3d 15, 18 (2d Cir. 1995)).

153. The requirement of "particularity" is found through two sources: the Federal Rules of Civil Procedure, Fed. R. Civ. P. 9(b), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(1)–(2). *Ganino v. Citizens Utilities Co.* further enunciated the Second Circuit's pleading standard for allegations of securities fraud, noting "[a]lthough speculation and conclusory allegations will not suffice, neither do we require

previously discussed challenges associated with proving a subjective activist mindset,[154] can severely hamper the likelihood of a plaintiff getting past the pleading stages of litigation.

III. EMPIRICAL ANALYSIS

Part II endeavored to theorize why misuse may be an enticing option for investors (both because of the large upside potential from economic gains and the low downside risks of regulatory actions or private suits). Part III attempts to evaluate these arguments by analyzing 13Gs that were later switched to 13Ds in order to identify macro trends among investors and their choice of filings. An important caveat is that nothing in this analysis definitively proves that a switch is the result of 13G misuse. Such a determination could only be met after a probing inquiry into the events and decisions surrounding those specific filings.[155] However, looking with a critical lens, a high prevalence of suspect switches across a large sampling of investors can be helpful indicia that misuse may be occurring on a systemic basis and therefore warrants greater filing-specific inquiries. Section III.A discusses the methodology utilized in forming the switch data set. Section III.B then analyzes the summary statistics of this data set, looking particularly at the trends among investors in when and how often they choose to switch. Should regulators agree that such trends are troublesome, these findings can be used to identify target areas for enhanced regulatory scrutiny.[156]

A. *Formulation of Data Set*

The data set consists of all 13G and 13D filings submitted between January 1, 2006, and October 7, 2014.[157] This amounts to 300,000 filings. Of these, all amended filings were removed in order to focus solely on the original filings—the first indication of either a passive or activist intent. Within this condensed data set, filings were organized into

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'great specificity' provided the plaintiff alleges enough facts to support 'a strong inference of fraudulent intent.'" 228 F.3d 154, 168–69 (2d Cir. 2000) (quoting Stevelman v. Alias Research Inc., 174 F.3d 79, 84 (2d Cir. 1999)).

154. See supra section II.B (discussing difficulties in proving subjective state of mind).

155. See supra notes 72–73 and accompanying text (discussing problems of subjectivity and difficulties of proof in this area).

156. See infra Part IV (providing detailed recommendations for such regulatory enhancements).

157. The filing data was collected from the EDGAR database and made available through WhaleWisdom.com, a financial analysis website which provides tools to track beneficial ownership filings. What is WhaleWisdom?, WhaleWisdom, http://whalewisdom.com/info/about [http://perma.cc/8K8Y-GF8D] (last visited Sept. 14, 2015). Share price data was acquired through the Wharton Research Data Services (WRDS) database and consolidated with the beneficial ownership reports based on the date of filing. WRDS, http://wrds-web.wharton.upenn.edu/wrds/ [https://perma.cc/6PTY-GVHC] (last visited Sept. 14, 2015).

respective investor–target combinations in order to identify all the filings an investor submitted for a single target company. When an investor–target combination experienced a 13G filing followed after by a 13D filing at any time during the assessed period, the pair was identified as a "switch."[158] In all, there were 1,305 switches in the time period.

B. *Summary Statistics*

In order for the reader to more easily follow the analysis below, data tables are included in the Appendix.

1. *Likelihood of Switching.*[159] — Of the original 73,819 passive-indicating 13G filings in the period, only about 2% were eventually switched to a 13D.[160] However, some investors were much more likely than others to follow an initial passive filing with an eventual change to an activist position. Of the 1,305 switches, there were 872 unique investors involved. Excluding investors who filed less than five filings in the time period,[161] there were forty investors who ended up switching from a 13G to a 13D more than 25% of the time—meaning that for every four 13G filings they submitted, one would be switched from a passive position to an activist position sometime in the future. Seven of these investors switched their positions in more than half of their initial 13G investments. In absolute terms, the largest number of switches for any single investor was twenty-one (out of seventy-nine total 13G filings in the period). Eighty-six investors switched three or more times, with six investors switching ten times or more during the period.[162]

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158. Reverse switches, in which a 13D filing was later followed by a 13G filing, were not included in the final data set. The switch from a 13D to a 13G filing is less common, largely because the SEC has stated that "[o]nly a security holder who was *initially* eligible to report its beneficial ownership on a Schedule 13G and was later required to file a Schedule 13D may switch to reporting on a Schedule 13G." Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, SEC (Jan. 3, 2014), https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm [https://perma.cc/BX3E-QDFB] (emphasis added). The SEC further clarified that if a 13D filer falls below the five percent ownership reporting threshold and then later breaches the threshold, it may switch to a 13G position. Such activity may account for some of the reverse switches seen in the data set, while other reverse switches may reflect the investor's change in stance from active to passive—perhaps because the investor no longer intends to influence management decisions.

159. See infra Appendix, Tables A.1–.2 (highlighting which investors have greatest tendency to switch filing types).

160. This percentage underestimated the likelihood of switches from activist investors, as the original 13G filings include not only passive-indicating investors but also institutional and other exempt participants under 17 C.F.R. § 240.13d-1(b), (d) (2015) who would be less likely to switch to a 13D filing.

161. Because of their smaller absolute number of filings, these investors tend to overestimate the relative frequency of switching. For example, an investor with only one filing in the period might have a 100% switch rate.

162. Several of these high number of switches involved multiple switches within the same investor–target combination, meaning that an investor may have switched from a

An investor who consistently uses a strategy of filing a 13G and then switching to a 13D later in time raises a red flag that the investor may be repeating an intentional tactic to misuse the 13G filing. Granted, it is not unexpected that an investor may enter an investment with no activist intentions, and then upon holding the securities for a while and seeing the workings and potential of the company, will reconsider his position and take on a more active role. This is not unlawful, and indeed the reporting rules envisioned that such circumstances might occur.[163] However, when investors repeat this switch tactic in a high proportion of their investments, it suggests the possibility that investors may be entering into investments expecting to take activist actions but utilizing the 13G filing to avoid market or regulatory scrutiny in the meantime.[164]

2. *Price and Ownership Changes Between Filings.*[165] — In addition to showing that some investors have a high propensity for switching, the data also suggests that switching sometimes occurs when it is highly beneficial for the investor. For a switch to be beneficial, it was assumed to require two criteria. First, there must be an increase in stock ownership between the 13G and 13D filings. Second, there must be a price increase in the days immediately following the disclosure of the 13D activist position. Under this admittedly simplistic model,[166] an investor seems to have benefitted from the acquisition of additional shares at a low price (or at least *relatively* lower than if the investor disclosed an activist position first and then competed with the rest of the market to acquire more shares).[167]

13G to a 13D at some point in time, reversed its position back to a passive 13G, and then later switched once more to a 13D.

163. The SEC provided for the ability to switch from a 13G to a 13D due to a change in investment purpose and required a ten-day cooling-off period to protect against misuse. 17 C.F.R. § 240.13d-1(e)–(f). The current 13D filing also provides a space for investors to mark if they have previously filed under a 13G, clearly showing the SEC expected such switches to occur. SEC, Schedule 13D Blank Form, id. § 240.13d-101.

164. See supra Part II (discussing benefits of abusing 13G filing). Again, the existence of numerous switches for a single investor is not definitive evidence of foul play, but it is an important red flag for regulators to consider. See infra section IV.A (proposing increased regulatory scrutiny be targeted at suspicious trends highlighted above).

165. See infra Appendix, Tables A.3–.4 (which investors have greatest tendency toward beneficial switches).

166. One limitation of this model is that it does not account for price movements in between the time of the 13G filing and the date of the 13D filing, and thus only approximates the benefit accruing to the filer from delaying the 13D filing. A more advanced model could consider the actual price paid by the filer in the comparison, as Item 5(c) of the 13D filing requires the filer to disclose the price and quantity of any transactions in the relevant class of securities in the last sixty days preceding the filing.

167. This model assumes that the price jump experienced in the three days following the switch filing is due largely to the market absorbing news of the changed position. The model is also based off the "surprise attack" theory for why 13G misuse may be enticing. See supra section II.C.1 (discussing this strategy). There are, however, additional non-price reasons to misuse 13G which cannot be easily captured by this high-level data anal-

Of the 1,305 switches, 1,022 of them showed an increase in the number of outstanding shares held by the investor from the time between the initial 13G filing and the switch to the 13D filing.[168] This suggests (as expected) that most investors will seek to acquire additional ownership interest before announcing their new intentions to the market. Of these switches, 357 had the same or lower share prices at the time of the 13D filing than at the time of the 13G filing (meaning prices did not rise in the time of increased share ownership). Yet 171 of these experienced a price jump *after* the 13D switch was announced.[169] Such a situation suggests the market may have been discounting the value of the stock because it lacked information about the assumed truly active investor. These were considered to be the beneficial switches.

Six of the investors conducted three or more beneficial switches during the period. Excluding investors who filed less than five filings in the time period,[170] ten investors had a beneficial switch in 20% or more of their switches, with two investors having 50% of their switches considered beneficial. These are the switches that may be most suspect because, had an activist intention been announced earlier, the cost of acquisition of the additional ownership interest could have come at a steeper price.[171] Thus, the parties partaking in these beneficial switches, if they were withholding their true activist intents, would have benefitted economically from maintaining a 13G passive filing.

A detailed example of such a beneficial switch may be enlightening: One investor filed its initial 13G at a point where it owned 9.8% of the company at a share price of $101.42. By the time it filed a 13D about eight months later, the price had fallen to $97.25 per share, yet the investor's ownership in the company had increased to 18.4%. Three days after the 13D was announced, the price of the stock jumped to $104.79, suggesting the market may have been undervaluing the security because it lacked the knowledge that a (possibly) activist investor was accumulating shares. In another example, an investor filed its initial 13G and announced it owned 7.6% of the target company at a share price of $7.01. When it switched to a 13D filing less than a year later, the price

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ysis. See supra section II.C.3 (discussing benefits of 13G filings in shareholder rights plans and antitrust contexts).

168. This number may be further inflated by those investors who have breached the twenty percent ownership threshold set under 17 C.F.R. § 240.13d-1(c)(3) and are therefore required to file a 13D regardless of their professed intentions.

169. For the purposes of this analysis, the price change was calculated looking three days after the 13D filing, a sufficient amount of time for markets to absorb the news of the investor's switch and transact accordingly. This short time frame is better suited to account for the market reaction to the switched filing and is unlikely to be impacted by any longer term changes in the fundamentals of the company. Of course, there could be other exogenous variables affecting the price jump besides the 13D announcement alone.

170. See supra note 161 (discussing rationale for excluding these investors).

171. Though again, it must be emphasized that these filings cannot be said to be improper on this information alone.

had dropped 11% to $6.25, yet the investor now owned 19.99% of the company, just shy of the regulatory-mandated twenty percent threshold for 13G eligibility.[172] After the investor announced a switch to an active position, the stock price jumped 15% to $7.16 within the subsequent three days, again suggesting the market may not have been applying sufficient value to the stock until an activist position was revealed.

Both of these examples illustrate an investor's opportunity to acquire additional ownership at a relatively lower price. Had a 13D filing been utilized instead of the 13G filing, it is conceivable that stock prices would have risen and made the investment less attractive to the investor utilizing this tactic. Although this data alone cannot say whether these switches are improper, the analysis provides a natural starting point for regulatory scrutiny of possible misuse of the 13G filing.[173]

3. *Timing to Switch.*[174] — Investors varied greatly as to the time delay between their initial 13G filing and the later switch to a 13D. Of the 1,305 switches, 107 occurred within thirty days and 328 occurred within 120 days. On the other end of the spectrum, 271 switches occurred after more than two years, with forty-five of those switches occurring after more than five years. The average number of days for a switch was 468, with the median number of days being 306.

The timing of a switch may contain some informational value as to the propensity for misuse, as it can be expected that switches occurring in a shorter time frame will be more suspect than switches occurring after a longer time. This is because the "surprise attack" theory alluded to throughout this Note[175] requires some foresight that the true investment intention will be disclosed after the investor has acquired more shares. Since acquiring shares can be done in a relatively short amount of time, investors who switch to an active position after a very large amount of time (for instance a year or more) are unlikely to have initially entered into the position with a secret intention.[176]

With this in mind, the analysis turned to those investors who displayed a pattern of short-term switches. There were two investors who switched three separate times each within thirty days of their initial 13G

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172. 17 C.F.R. § 240.13d-1(c)(3).

173. See infra section IV.A (proposing increased regulatory scrutiny be targeted at suspicious trends highlighted above).

174. See infra Appendix, Table A.5 (summarizing time ranges between initial 13G filings and switches to 13D filings).

175. See, e.g., supra sections II.C.1–II.C.2 (describing "surprise attack" theory of 13G abuse and noting which investors would be likely to benefit from such tactics); supra notes 166–167 and accompanying text (utilizing "surprise attack" theory as model of beneficial switches); infra note 181 (discussing impact of shortening ten-day filing window on feasibility of 13G/13D surprise attacks).

176. Though of course, the possibility remains that even if they initially utilized the 13G correctly, they may have stayed on the passive filing longer than appropriate in the last weeks or months of their 13G filings.

filing—meaning that in three of their investments, they had filed a passive 13G and subsequently switched to an activist 13D within a month. Nine investors had three or more switches occurring within 120 days of an initial 13G filing, with one of those investors having six switches in this category. Finally, thirty-eight investors switched three or more times within one year of their initial 13G filings, with fifteen being the largest number of under-a-year switches for a single investor. Although additional research would be needed to see if such switches were ultimately inappropriate, the fact that some investors consistently switch within a short time frame suggests inappropriate filing tactics may be at play and provides another starting point for enhanced regulatory scrutiny.[177]

IV. RECOMMENDATIONS FOR CHANGE

Having explored the empirical trends which suggest misuse of 13G filings may be occurring, this Note next turns to possible means of stemming such actions. Because of the finite resources available to the SEC for policing beneficial ownership reports,[178] the suggestions here range from those where little additional resources are required to those necessitating much more significant changes. Regardless of whether and how extensively the SEC chooses to increase their supervisory presence, the 13G and 13D reporting rules are ripe for change. For example, there is currently a vociferous debate between public company management and activist investors over whether the ten-day lag time for 13D filings should be shortened to one day in order to prevent aggressive share accumulation in the nine additional days before the activist position is required to be disclosed to the market.[179] Former SEC Chairman Mary Schapiro seemed to acknowledge the existence of these and other related concerns, announcing that the SEC planned to "begin a broad review of our beneficial ownership reporting rules," and noting they were "considering whether they should be changed in light of modern investment strategies."[180] The possibility of 13G misuse is closely interrelated to some of these hotly contested issues,[181] and so the subject

177. See infra section IV.A (proposing increased regulatory scrutiny be targeted at suspicious trends highlighted above).

178. Because of these limited resources, the SEC's review process largely relies on "selectively" reviewing filings and "concentrat[ing] its resources on critical disclosures that appear to conflict with Commission rules or the applicable accounting standards and on disclosure that appears to be materially deficient in explanation or clarity." SEC Div. Corp. Fin., Filing Review Process, http://www.sec.gov/divisions/corpfin/cffilingreview.htm#.VKRgiCvF9JM [http://perma.cc/3FFN-2HS6] (last modified Sept. 9, 2015).

179. See supra note 46 (summarizing two major schools of thought in filing lag time debate).

180. Mary L. Schapiro, Chairman, SEC, Remarks at the Transatlantic Corporate Governance Dialogue (Dec. 15, 2011), http://www.sec.gov/news/speech/2011/spch121511mls.htm [http://perma.cc/G3RB-RQFG].

181. If the SEC chooses to reduce the 13D ten-day reporting window, investors may turn to the 13G filing in an attempt to minimize market scrutiny while still increasing

is also worthy of policymakers' attention. This Part proposes two possible avenues of policy changes for consideration. The first concerns enforcement actions taken on behalf of the SEC and is discussed in section IV.A. The second avenue consists of structural changes to the current filings and is discussed in section IV.B.

A. *Increased Supervisory Review and Enforcement Actions*

As highlighted from the data above, there are trends in the data that suggest that misuse of the 13G filing option may be occurring.[182] In addition to the empirical data analyzed above, the existence of private suits further bolsters the notion that questionable tactics are being utilized by investors to skirt full disclosures to the market.[183] Yet the fact remains that the SEC has not brought an enforcement action against an investor for willful abuse of the 13G filing.[184] This lack of action may be due to the SEC's failure to *strategically* police 13G filings, and therefore this Note proposes several enhancements to the SEC's supervisory framework.

Because a deep-dive analysis of each 13G/13D switch would not be possible given resource constraints, the SEC could begin such a review by focusing on those switches with suspect characteristics and those investors which continually utilize the switch tactic, as highlighted by the preceding section of this Note.[185] Several of the same investors appear on the summary tables across multiple measures of suspect switches. These would make for a logical starting point to any regulatory review. The SEC is no stranger to using "quantitative analytics" to assess high risk filings, as seen in their recent action against late filers,[186] and so these monitoring recommendations could be relatively easily implemented.

In their efforts to increase their supervisory presence in this area, the SEC should take guidance from the actions taken by the DOJ and FTC to prevent abuse of the passive investor exemption in the antitrust

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ownership interests. Although a 13G filing would not be as advantageous for avoiding market reaction as the current nine extra days without any filing whatsoever, it may be an enticing alternative. It would therefore be highly beneficial from a regulatory standpoint to adopt additional protections against 13G filing misuse (such as those advanced here) at the same time as reducing the reporting window.

182. See supra Part III (examining empirical evidence of suspect switching behavior).

183. See supra notes 93–108 and accompanying text (detailing previous cases alleging 13G abuse).

184. See supra note 139 (highlighting relative lack of enforcement actions relevant to theory of misuse advanced in this Note).

185. See supra Part III (detailing suspect switches); infra Appendix, Tables A.2–6 (highlighting some repeat offenders).

186. See Press Release, SEC, supra note 139 ("'Using *quantitative analytics*, we identified individuals and companies with especially high rates of filing deficiencies, and we are bringing these actions together to send a clear message about the importance of these filing provisions . . . .'" (emphasis added) (quoting Andrew M. Calamari, Director of SEC's New York Regional Office)).

merger context.[187] The antitrust regulators have the ability to impose stiff penalties associated with false claims of civil passivity under the HSR Act, as violations can result in penalties of $10,000 per day.[188] Therefore, improperly claiming a passive position may result in very significant penalties if the stock is held for a long period,[189] providing a strong disincentive for would-be abusers. The SEC is similarly authorized to impose civil penalties under the 1934 Act.[190] Should the SEC choose to devote the resources needed to bring a federal enforcement action on the basis of 13G misuse, imposing substantial penalties could send a strong deterrence signal to future filers and would help cover the costs of such actions. The SEC can also utilize its power of administrative proceedings if it wants to avoid the more arduous task of bringing lawsuits in federal court yet send the same message effectively.[191]

In the antitrust context, trying to "switch" positions under the HSR Act by filing notification with the FTC and DOJ, similar to how one may switch from a 13G to a 13D filing, is likely to raise an inquiring eye from antitrust regulators as to the reporter's previous actions.[192] The SEC, by contrast, is not so suspicious of investment position changes, as evidenced by the lack of any public inquiry into a switched filing.[193] If the SEC were to increase its level of inquiry into 13G/13D switches, the SEC

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187. See supra notes 131–133 and accompanying text (discussing HSR Act's passive investor exemption).

188. 15 U.S.C. § 18a(g)(1) (2012).

189. Pfunder, supra note 130, at 77 n.2.

190. See 15 U.S.C. § 77x ("Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof . . . shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.").

191. The SEC was given the power to institute administrative proceedings through Dodd-Frank and recently increased its usage of administrative proceedings in other contexts. See Peter K.M. Chan et al., There's No Place Like Home: SEC Increasingly Uses Administrative Proceedings, Morgan Lewis (Dec. 22, 2014), http://www.morganlewis.com/pubs/theres-no-place-like-home-sec-increasingly-uses-administrative-proceedings (on file with the *Columbia Law Review*) ("[W]hen compared to calendar year 2012, there have been approximately 35% more APs brought in 2014, even though the 2014 calendar year has not yet ended.").

192. See Pfunder, supra note 130, at 75 ("An acquiror that buys shares in reliance on the passive investor exemption and then changes its mind . . . may assume considerable risk of a civil penalty action by federal antitrust enforcement agencies if its efforts to influence management cast doubt on its earlier claim of passive intent.").

193. In addition to bringing a publicly available formal action against an investor for improperly utilizing the Schedule 13G, the SEC could also issue its inquiry through a public comment. In the first round of review, the SEC may prompt questions to the investor in an attempt to enhance or broaden the disclosure (if necessary). SEC Div. Corp. Fin., supra note 178 (explaining SEC staff may request additional information in order to "better understand the company's disclosure, revise disclosure in a document on file with the SEC, provide additional disclosure in a document on file with the SEC, or provide additional or different disclosure in a future filing with the SEC"). These comment letters and responses are publicly available on the SEC's EDGAR system. Id.

could rely heavily on ex-post review, focusing on those investors who have taken clearly activist steps after switching to a 13D and looking backwards to see if their earlier reliance on 13G filings may have been inappropriate.

If the SEC were to increase its level of skepticism upon receiving a switched filing, it could draw inspiration from how the antitrust regulators currently investigate switches: by looking at the historical circumstances surrounding the switch.[194] Critics of this proposal may emphasize that such information is not readily available to the SEC when performing their review and therefore acquiring that information would require extensive resources. Therefore, to help in the review process, any 13D filing resulting from a switch should require a detailed statement from the investor explaining the circumstances of the switch.[195]

Unlike the SEC, antitrust regulators have not shied away from bringing legal suits to challenge possible misuse of the antitrust passive investment exemption. The agencies have brought a number of civil penalty cases against acquirers who claimed passive investor status but went on to exceed the set thresholds under the exemption, a clear violation.[196] But they also continue to monitor and occasionally challenge claims of passive investment under the HSR Act even when thresholds are not breached. For instance, in 2003, the DOJ pursued a civil penalty case challenging the asserted passivity of defendant Smithfield Foods.[197] The DOJ claimed that Smithfield failed to submit required filings after acquiring a substantial ownership interest in competitor IBP and could not rely on the passive investor exemption to excuse the lack of filing.[198] The DOJ emphasized in its complaint that this violation occurred because "[a]t the time it made the acquisitions . . . Smithfield was also considering and

194. See Pfunder, supra note 130, at 75 (noting DOJ and FTC might question evidence reflecting acquirer's passive intent, evidence reflecting acquirer's change of mind, length of time between the switch, any intervening circumstances, and manner and extent to which acquirer now wants to exert control).

195. For additional discussion of proposed structural changes to the 13G and 13D filings, see infra section IV.B.

196. See, e.g., Press Release, FTC, Coastal Corp. Agrees to Pay $230,000, Settling First Hart-Scott-Rodino Civil Penalties Case, Under FTC-Negotiated Consent Judgment (Aug. 30, 1984), http://www.ftc.gov/sites/default/files/documents/cases/1984/08/840830coastalnewsrelease.pdf [http://perma.cc/7Y22-K3MK] (noting Coastal already owned shares in excess of threshold set by HSR Act and continued to buy more without filing with FTC); Press Release, FTC, Federal Trade Commission Obtains Civil Penalty Against William H. Gates III for Violation of Hart-Scott-Rodino Act (May 3, 2004), http://www.ftc.gov/news-events/press-releases/2004/05/federal-trade-commission-obtains-civil-penalty-against-william-h [http://perma.cc/A2SA-SGEA] (noting Gates acquired additional shares, putting him over statutory thresholds, without filing with FTC).

197. Complaint ¶¶ 12, 18, United States v. Smithfield Foods, Inc., No. 1:03CV00434 (D.D.C. Feb. 28, 2003), 2003 WL 22064255.

198. See id. ¶¶ 11, 15 (noting Smithfield's acquisition surpassed statutory thresholds and triggered HSR Act reporting requirements, as set under 15 U.S.C § 18a(a)(2)(A) (2012)).

taking steps toward a Smithfield–IBP combination."[199] Although Smithfield announced that it would litigate the lawsuit[200] and successfully challenged the initial filing for lack of personal jurisdiction,[201] Smithfield eventually settled the case for two million dollars.[202] The DOJ brought a similar suit around the same time against Manulife Financial Corporation for its failure to file after acquiring an interest in competitor John Hancock.[203] The DOJ again emphasized that the defendant was "considering a Manulife-John Hancock combination" at the time of purchase and cited previous preliminary conversations and statements about a business combination between the two companies as evidence of this intent.[204] Manulife similarly settled, this time for one million dollars.[205]

The mere fact that antitrust regulators have shown a willingness to pursue legal action against abusers of the antitrust passive investor exemption creates a disincentive in the minds of prospective filers. A similar action by the SEC could help send a message to the markets that the SEC takes misuse of 13G filings seriously and may prompt investors to think twice when choosing between a 13G and a 13D.[206]

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199. Id. ¶¶ 18, 26. It is worth noting that these assertions challenge not only the objective steps taken by Smithfield but their subjective state of mind as well.

200. Agencies Send a Strong Message on HSR Filing Requirements to Bill Gates and Others, Wilmer Cutler Pickering LLP 2 (May 11, 2004), http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Antitrust%20Update%2005-11-04.pdf [http://perma.cc/THK4-Z2V3].

201. United States v. Smithfield Foods, Inc., 332 F. Supp. 2d 55, 63 (D.D.C. 2004) (finding lack of personal jurisdiction in D.C. District and transferring case to Eastern District of Virginia).

202. United States v. Smithfield Foods, Inc., No. 2:04CV526, 2004 WL 3167628, at *1 (E.D. Va. Nov. 12, 2004).

203. Complaint ¶ 1, United States v. Manulife Fin. Corp., No. 1:04CV00722 (D.D.C. May 3, 2004), 2004 WL 2058031.

204. Id. ¶ 20.

205. United States v. Manulife Fin. Corp., No. 04 0722, 2004 WL 1944847, at *1 (D.D.C. May 27, 2004).

206. The SEC's recent charges against repeated late filers of 13Gs and 13Ds, see supra note 186 (detailing press release), prompted a noticeable response from legal practitioners calling the action a "crackdown" and warning clients of "aggressive enforcement." E.g., Howard E. Berkenblit, Kate L. Salley & Jamie L. Frank, Sullivan & Worcester LLP, New SEC Crackdown on Late Filings by Insiders and Major Shareholders, Lexology (Sept. 17, 2014), http://www.lexology.com/library/detail.aspx?g=da95770f-2d42-444e-863c-0c5494e07bd2 [http://perma.cc/7FLY-BZFN]; Michael Neidell & Spencer Feldman, CLIENT ALERT: SEC Announces Aggressive Enforcement Action Against Delinquent Schedule 13D/13G and Form 4 Filers, Olshan Frome Wolosky LLP (Sept. 15, 2014), http://www.olshanlaw.com/resources-alerts-SEC-Aggressive-13D-13G-Form4Filers.html [http://perma.cc/N77W-PFLA]. An enforcement action based on intentional misuse, instead of mere inadvertence, would likely have an even greater response from the legal community and therefore a larger deterrence impact on prospective filers.

B. *Structural Changes to Reporting Framework*

Policymakers may also consider supplementing the aforementioned changes to the SEC's supervisory presence with structural changes to the filing requirements.[207] These structural changes would seek to have supposedly passive investors more fully explain their subjective intent behind the filings, thus allowing regulators to easily follow up on suspect switches.[208] This can be accomplished by including additional free text fields on the 13G filing form, similar to how the current 13D form allows for additional exhibits and descriptions to be added to the filing.[209] Passive filers could be required to include a textual description of their intentions, clearly certify they do not currently harbor any activist ambitions, and note any "Contracts, Arrangements, Understandings or Relationships with Respect to Securities of the Issuer" as currently required under the 13D form.[210] This will better identify the relationship between the investor and issuer and will help raise red flags to possible activist actions.

Critics of this suggestion may counter that the original purpose of the 13G passive investor exception was to reduce the amount of unimportant information included in filings, in order to help investors focus on the transactions most likely to result in ownership or control changes.[211] Furthermore, requiring too much information could reduce the incentive to use the 13G filing option,[212] which would harm the legitimate public policy purposes for the short-form filing. Considering this criticism, the increased disclosure requirements should only be imposed on the investors filing under the Rule 13d-1(c) passive investor exception, as they have a greater potential to misuse the 13G filing.[213]

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207. The SEC has the statutory authority to expand beneficial ownership reports to require any "additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78m(d)(1) (2012).

208. As it is, the 13G filing is relatively sparse and tells no "story" behind the investment, unlike the 13D filing. Compare SEC, Schedule 13G Blank Form, 17 C.F.R. § 240.13d-102 (2015) (requiring investor to describe purposes of acquisition, all transactions in stock that were effected sixty days prior to filing, and any arrangements or relationships with corporate issuer), with SEC, Schedule 13D Blank Form, id. § 240.13d-101 (omitting these requirements).

209. SEC, Schedule 13D Blank Form, id. § 240.13d-101.

210. Id. (requiring disclosure of such information under Item 6).

211. See supra notes 27–29 and accompanying text (discussing congressional decision to exempt from 13D filing requirements those investors who pose little risk of ownership and/or control changes); supra notes 57–58 and accompanying text (discussing SEC intention that limiting scope of investors required to file Schedule 13D would allow regulators and market participants to more easily identify concerning stock accumulations).

212. See supra notes 52–54 and accompanying text (discussing chief benefits of 13G filing over 13D filing).

213. See supra Part II (highlighting how 13G misuse may be enticing for self-professed investors filing under SEC Rule 13d-1(c)).

Those institutional and other exempt investors utilizing the 13G filing under Rule 13d-1(b) or (d) would not be required to report these additional details, consistent with the current framework.[214] This could in effect create a new medium-intensity filing for self-professed passive investors, falling somewhere between the long-form 13D and the short-form 13G.[215]

Finally, the SEC might consider adjusting the 13D schedule as well. The 13D form already includes a check box for the filer to note if he previously utilized a 13G filing to report the stock position.[216] Checking this box could trigger an additional set of questions to be answered, based on the sorts of inquiries discussed under the antitrust framework by which regulators can decipher whether a switch was proper.[217] This increased disclosure could act as a deterrent on those investors who consistently use the switch tactic,[218] as knowing they must publicly disclose the purposes for their change of position, investors may rethink their choice of relying initially on a 13G filing option. Furthermore, this would better aid regulators in investigating suspect switches, as well as provide sources of possible misleading or untrue statements as part of a 10b-5 securities fraud claim.[219]

CONCLUSION

The possible misuse of 13G filings by truly active investors has been a seemingly accepted but unaddressed facet of securities markets. This Note has introduced a theory of why such misuse may be occurring and analyzed empirical trends in the data that support that theory. Should policymakers agree that this data shows suspicious behavior and therefore additional inquiries are warranted, this Note has also proposed enhancements to the current regulatory regime. These supervisory and structural changes seek to assist the SEC in identifying suspect behavior, in the hope that these enhancements will better assure the market that those transactions which might lead to a change in control are being properly reported. However they choose to respond, policymakers

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214. See supra text accompanying note 52 (describing current short-form reporting requirements for 13G filings).

215. This is not a radical departure from the current framework, which already distinguishes two "types" of 13G filings. See supra Table 1 (delineating between Schedule 13Gs filed by passive investors under Rule 13d-1(c) and those filed by institutional and other exempt investors under Rule 13d-1(b), (d)).

216. SEC, Schedule 13D Blank Form, 17 C.F.R. § 240.13d-101 (2015).

217. See supra note 194 (listing questions intended to elucidate historical circumstances of questionable switches in antitrust context).

218. See supra section III.B.1 (highlighting tendency of investors to repeatedly switch self-professed passivity).

219. See supra notes 150–154 and accompanying text (highlighting use of SEC Rule 10b-5 fraud claims related to improper use of 13G filings).

should be cognizant of the need to add deterrence incentives into a space of unlawful activity that has up until now been too much ignored.

APPENDIX: DATA SUMMARY TABLES

TABLE A.1: MOST SWITCHES BY INVESTOR (RANKED IN ABSOLUTE TERMS)

Investor Name	Total # of G Filings	# of Switches	Percentage
Miller, Lloyd I., III	79	21	27%
Karpus Management	162	20	12%
City of London Investment Group	76	16	21%
Marxe, Austin W. & Greenhouse, David M.	197	14	7%
Harbinger Capital Partners	54	13	24%
Biotechnology Value Fund	71	10	14%
Osmium Partners	29	9	31%
Raging Capital Management	33	8	24%
Lazard Asset Management	120	8	7%
Coliseum Capital Management	20	7	35%

TABLE A.2: MOST SWITCHES BY INVESTOR (RANKED IN RELATIVE TERMS)

Investor Name	Total # of G Filings	# of Switches	Percentage
Standard General	5	3	60%
Feinberg, Stephen	7	4	57%
Singer, Karen	9	5	56%
Bandera Partners	11	6	55%
MFP Investors	8	4	50%
Trinad Capital Master Fund	6	3	50%
Cross River Capital Management	6	3	50%
LC Capital Master Fund	9	4	44%
Kamin, Peter H.	7	3	43%
Columbia Pacific Opportunity Fund	15	6	40%

TABLE A.3: MOST BENEFICIAL SWITCHES BY INVESTOR (RANKED IN ABSOLUTE TERMS)

Investor Name	# of Switches	# of Beneficial Switches	Percentage
City of London Investment Group	16	4	25%
Miller, Lloyd I., III	21	4	19%
Karpus Management	20	3	15%
Southeastern Asset Management	6	3	50%
Fairholme Capital Management	6	3	50%
Raging Capital Management	8	3	38%

TABLE A.4: MOST BENEFICIAL SWITCHES BY INVESTOR (RANKED IN RELATIVE TERMS)

Investor Name	# of Switches	# of Beneficial Switches	Percentage
Southeastern Asset Management	6	3	50%
Fairholme Capital Management	6	3	50%
Kopp Investment Advisors	5	2	40%
Raging Capital Management	8	3	38%
Bandera Partners	6	2	33%
Accipiter Capital Management	6	2	33%
Cannell, J. Carlo	6	2	33%
Columbia Pacific Opportunity Fund	6	2	33%
City of London Investment Group	16	4	25%
Cascade Investment	5	1	20%

TABLE A.5: LAG TIME BETWEEN INITIAL 13G FILING AND SWITCH

Time between 13G and 13D Filings	# of Switches
1–30 days	107
31–120 days	221
121–365 days	423
1–2 years	283
>2 years	271

TABLE A.6: MOST SHORT TIMEFRAME SWITCHES BY INVESTOR
(RANKED IN ABSOLUTE TERMS)

Investor Name	# of Switches within 30 days	# of Switches within 120 days	# of Switches within 1 year
Karpus Management	1	4	15
Miller, Lloyd I., III	1	6	14
City of London Investment Group	1	4	14
Marxe, Austin W. & Greenhouse, David M.	1	4	10
Osmium Partners	3	4	6
Biotechnology Value Fund	0	2	6
Third Avenue Management	1	2	5
Stadium Capital Management		1	5
Raging Capital Management	1	3	5
Harbinger Capital Partners	1	2	5
Doucet Asset Management	3	3	5
Columbia Pacific Opportunity Fund	1	2	5
Cannell, J. Carlo	0	3	5
Tang Capital Partners	0	3	4
Fairholme Capital Management	0	1	4