# THE TIMING OF SCHEDULE 13D[1]

In the field of corporate law, timing is everything. Perhaps in no area is this more the case than in disclosure—specifically, the disclosure obligations of the Securities and Exchange Act of 1934. Implemented by a phalanx of SEC rules, the Act carefully prescribes how and when an investor must make public its equity position in a company. As every introductory corporate lawyer quickly comes to know, Section 13(d) of the Act requires that any person who acquires beneficial ownership of five percent or more of an issuer's stock file a public statement announcing such ownership "within ten days."[2] This congressional attempt to "ensure that shareholders [are] promptly alerted to possible change[s] in company management and corporate control"[3] often stands at the forefront of shareholder activism battles.

Despite the provision's undeniable significance, its meaning remains uncertain. Judges and commentators cannot agree whether the statute mandates filing within ten *business* days or ten *calendar* days. While a seemingly trivial distinction, by last count the timeliness of almost *fifty percent* of Schedule 13D filings hinged on just this issue.[4] And yet, there is no settled answer to a simple question: when must a Schedule 13D be filed?

For their own part, investors who want to determine which timeline to follow are likely to come up empty. In public releases, the SEC has vacillated between the business-day[5] and calendar-day[6] approaches. Confusion is not limited to the agency. At least three courts,[7] three treatises,[8]

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1 Thanks to E. Garrett West and Leslie Arffa for their helpful comments and unflagging support. All errors are my own. The views expressed herein do not necessarily reflect those of Wachtell, Lipton, Rosen & Katz.

2 15 U.S.C. § 78m(d)(1).

3 Carmen Lu, Comment, *Unpacking Wolf Packs*, 125 YALE L.J. 773, 777 (2016).

4 Lucian A. Bebchuk, Alon Bray, Robert J. Jackson, Jr. & Wei Jiang, *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy*, 39 J. CORP. L 1, 21 tbl. 6 (2013).

5 *See In the Matter of William A. Houlihan, Respondent*, Release No. 74504 (Mar. 13, 2015) (stating that "individuals comply with Section 13(d) of the Exchange Act by filing a Schedule 13D . . . no later than ten business days after" a triggering event); *In the Matter of Jane G. Ciabattoni, Respondent*, Release No. 74501 (Mar. 13, 2015) (same); *In the Matter of Berjaya Lottery Mgmt. (H.K.) LTD., Respondent*, Release No. 74498 (Mar. 13, 2015) (same); *In the Matter of SMP Investments I, LLC, Respondent*, Release No. 74502 (Mar. 13, 2015) (same); *In the Matter of Brian Potiker, Respondent*, Release No. 74503 (Mar. 13, 2015) (same).

6 *See In the Matter of Harvey Katz, William M. Siegel, Thomas M. Dean, Jeffry M. Picower, Explanations Inc., & Decisions Inc.*, 47 S.E.C. 1044 (Apr. 25, 1984) (Schedule 13D must be filed "within 10 calendar days"); *Sec. & Exch. Comm'n Release Notice*, Release No. 1001 (July 3, 1996) (same); *In the Matter of FP Res. USA Inc. & Lobster Point Holdings Ltd., Respondents*, Release No. 83626 (July 13, 2018) (same).

7 *See In re E.S. Bankest, L.C.*, 2006 WL 3922112, at *2 (Bankr. S.D. Fla. Dec. 14, 2006) (Schedule 13D "is required to be filed . . . within ten (10) business days of the acquisition"); *S.E.C.* v. *Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 589–90 (S.D.N.Y. 1993), *aff'd sub nom. S.E.C.* v. *Posner*, 16 F.3d 520 (2d Cir. 1994) (same); *Int'l Banknote Co.* v. *Muller*, 713 F. Supp. 612, 619 (S.D.N.Y. 1989) (same).

8 *See* M. STEINBERG, UNDERSTANDING SECURITIES LAW 488 (5th ed. 2009) ("Exchange Act Section 13(d) [r]equires [filing of] . . . a Schedule 13D statement of ownership with the SEC within ten business days.") (internal

and four law review articles[9] have opted for the business-day approach, while other law review articles,[10] treatises,[11] and many law firms[12] encourage their clients to adopt the calendar-day approach. The dissonance has ensnared sophisticated non-lawyers, too.[13]

This confusion has generated problems both practical and fundamental. To avoid penalties for untimely disclosures, 13D filers must understand the burden that the securities laws impose. And to remain faithful to Congress's intent in passing 13(d), a more rigorous analysis of the statute's text remains warranted. In this regard, existing commentary has failed. Not only is it entirely perfunctory—never explaining why the calendar-day approach or business-day approach is preferable in light of the statute's silence on the point—it is also deeply at odds with itself.

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quotation marks omitted); Arthur Fleischer, Jr., Alexander R. Sussman & Gail Weinstein, *Takeover Defense*, WOLTERS KLUWER § 10.08, at 4 (2018 8th ed.) (same); Paul J. Galanti, *Regulation of Tender Offers and Takeovers Under Federal Law*, IND. PRAC. SERIES § 45.2, at 1 (Oct. 2018) (same).

9 *See* Benjamin Chun, *A Brief Comparison of the Chinese and United States Securities Regulations Governing Corporate Takeovers*, 12 COLUM. J. ASIAN L. 99, 115 (1998) ("[A]cquirer must disclose its holdings by filing a Schedule 13D within ten business days."); J. Robert Brown, Jr., *Corporate Secrecy, the Federal Securities Laws, and the Disclosure of Ongoing Negotiations*, 36 CATH. U. L. REV. 93, 103 n.40 (1986) (same); Mark L. Mitchell & Jeffrey M. Netter, *The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission*, 49 BUS. LAW. 545, 554 (1994) (same); James G. Farris, Jr., *The Constitutionality of the North Carolina Control Share Acquisition Act*, 66 N.C. L. REV. 1123, 1123, n.5 (1988) (same).

10 Robert A. Prentice, *The Role of States in Tender Offers: An Analysis of CTS*, 1998 COLUM. BUS. L. REV. 1, 7 ("[S]ection 13(d) of the Williams Act requires . . . [filing] within ten calendar days.").

11 *See* Amy Bowerman Freed, *Beneficial Ownership Reporting Under Section 13(D) of the Securities Exchange Act of 1934*, AM. LAW. INST. (2011) (stating that a Schedule 13D must be filed "within 10 calendar days after the acquisition").

12 *See* Mintz Levin, *Summary of Schedule 13D and Schedule 13G Filing Obligations* (Feb. 14, 2015), https://www.mintz.com/sites/default/files/viewpoints/orig/14/2015/02/Memo_-Summary-of-Schedule-13D-and-13G-Filing-Obligations-DOC1.pdf ("Any person who acquires beneficial ownership of more than 5% of a class of equity securities . . . must report that acquisition on a Schedule 13D within 10 calendar days. . . ."); Orrick, *Schedule 13D: Congressional Move May Significant Affect Activist Strategies* (May 4, 2016), https://blogs.orrick.com/accruedknowledge/2016/05/04/schedule-13d-congressional-move-may-significantly-affect-activist-strategies (same).

13 *Compare* American Bankers Ass'n, *Form 8-K Disclosure of Certain Management Transactions* (Release No. 33-8090; 34-45742; File No. S7-09-02), 2002 WL 32850906, at *3 (June 24, 2002) ("We would suggest a ten-business day filing requirement more akin to that required under Section 13(d) of the Exchange Act."); *and* Office of the Assistant Secretary for Financial Markets, *New Rule Provides Recordkeeping and Reporting Requirements for Large Holdings in Treasury Securities*, U.S. DEP'T TREASURY, at 4, 5 (Aug. 14, 1996) (noting that trade associations, government securities dealers, and bank holding companies believe that Section 13(d) utilizes the business day approach); *with* Cleary, Gottlieb, Steen & Hamilton LLP, *Comments on Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions [Release Nos. 33-8917; 34-57781; File No. S7-10-08]*, 2008 WL 3275553, at *10 (June 27, 2008) (commenting that 13(d) requires "filing within 10 calendar days pursuant to Rule 13d-1(c)").

This Essay is an attempt to fill the breach. It will not only explain what Section 13(d) requires, but why.

## A CONSISTENT RULE

A proper interpretation of 13(d) must begin with the statute itself. This Part canvases the text of the SEC's rules and its governing statute, the statutory history of the Williams Act, and the prudential concerns which underlie the disclosure requirements more generally. I conclude that all of these factors favor the calendar-day approach.

### *Text*

In 1968, faced with "a gap in the federal securities laws" that allowed "shifts of corporate control to occur without adequate disclosure of information to investors," Congress passed the Williams Act.[14] As part of the Act, Congress developed a number of new disclosure obligations that were intended to ensure that "shareholders confronted by a tender offer" would be "informed about the intentions and qualifications of the" party making the offer.[15] In particular, the Williams Act mandates that any person who acquires the beneficial ownership of more than five percent of a class of registered securities file a statement containing certain information "within ten days."[16] The Act does not define whether "ten days" means ten calendar days—as might be expected in ordinary parlance—or ten business days, a more specialized meaning that might be preferable in a statute dealing with public markets (which operate on business days) and corporate entities (which, as one author has noted,[17] act on business-day timelines).

To understand which of these competing approaches is correct, it is useful to begin with the statute's text.[18] As is well known, the meaning of an ambiguous statutory term is often clarified by evaluating how that same term is used in analogous statutory provisions. Usually called the "canon of consistent usage," the presumption that identical terms within the same legal text have identical meanings is a staple of textualist statutory interpretation.[19]

Applying that method here, the best reading of the statute is that "day" means "calendar day." Section 78 of title 15—the section of the U.S. Code in which the securities disclosure obligations are codified—makes frequent use of the term "day" in reference to the various regulatory filing obligations that may befall investors. Across these sections, the phrase "business

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[14] *Gen. Aircraft Corp.* v. *Lampert*, 556 F.2d 90, 94 (1st Cir. 1977).

[15] *Chevron Corp.* v. *Pennzoil Co.*, 974 F.2d 1156, 1158 (9th Cir. 1992).

[16] 15 U.S.C. § 78m(d)(1).

[17] *See* Bebchuk et al., *supra* note 3, at 10 n. 22.

[18] *Cf. Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 137 (2d Cir. 2018) (Lohier, J., concurring) ("[T]he cart of legislative history is pulled by the plain text, not the other way around.").

[19] *See United States* v. *Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring in part and concurring in judgment) (explaining the canon of consistent usage).

day" is employed eight times, while the phrase "calendar day" appears just twice.[20] This suggests that when Congress intends to utilize a business-day approach, it does so by saying as much. Other standard interpretive canons makes this point clear enough: (i) the rule against surplusage[21] implies that the unadorned "day" cannot mean "business day;" and (ii) the canon of meaningful variation suggests that Congress's decision to specify "business day" means a "day" standing alone is an ordinary "calendar day."

The regulations that the SEC has promulgated to execute Section 13(d) follow a similar pattern. Across Regulation 13D-G, the SEC rule that governs investors' disclosure obligations, the term "day" is preceded by the term "business" on three occasions, but is not preceded by the term "calendar" at all. Using the line of interpretive logic laid out above, the SEC's semantic choices are telling: when the agency wants to describe a "business day," it utilizes those words specifically. Thus, even though the agency is on record as adopting both the business-day and calendar-day approaches,[22] the text of its own rules makes that only the latter interpretation is correct.

Congress and the SEC's specificity in this regard is well justified. As one court has recognized, the meaning of a "day" as "commonly understood" is a "twenty-four-hour period[]"—that is, a calendar day.[23] And, unless the statute or rule insists otherwise, the longstanding rule is that an otherwise ambiguous word in a legal text will be given its plain meaning. Thus, a straightforward reading of the statutory text makes clear that "day" means "calendar day."

*History and Purpose*

Even if one were to find the text of the governing law too terse, the legislative history of the Williams Act makes clear that the Act contemplates prompt disclosure. This again suggests that the ambiguous term "days" should be read in its shorter varietal—*i.e.*, calendar, not business.[24]

First, the Williams Act was "designed to require full and fair disclosure" of investors' substantial equity positions so that the investing public could accurately discern the market price of a company that might soon experience a change of control.[25] In that way, the Williams Act's drafters were principally concerned with ensuring short-term transparency in the securities

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20 For usage of calendar day, *see* 15 U.S.C. § 78l; *id.* § 78n; for usage of business day, *see id.* § 78l; *id.* § 78n; *id.* § 78j-1; *id.* § 78s; *id.* § 78p; *id.* § 78i; *id.* § 78c; *id.* § 78o.

21 *See Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012).

22 *See* note 4, *supra*.

23 *Pleasant-El* v. *Oil Recovery Co.*, 148 F.3d 1300, 1302 (11th Cir. 1998).

24 The argument here—that ambiguities in the text ought to be interpreted, in part, by reference to the Williams Act's overarching goals—is a variant of Chief Justice Roberts's observation in *Burwell* that a "fair reading of legislation demands a fair understanding of the legislative plan." *King* v. *Burwell*, 135 S. Ct. 2480, 2946 (2015).

25 *See* S. Rep. No. 90-550 (1967).

markets.[26] Without information being made public quickly, the Williams Act's sponsors realized that takeover bids or shifts in corporate control could occur in secret.[27] Thus, the ten-day timeline was conceived to alert the marketplace to rapid accumulations of shares as fast as practicably possible.[28]

The Williams Act also mandates that every Schedule 13D be amended "promptly" in the event of a material change in the investor's equity position—for example, an increase or decrease of 1% of the investor's holdings.[29] Here again, the Act's framers emphasized that the speed of disclosure was paramount. In keeping with congressional intent, the SEC has noted that "promptly" means that an investor must amend its disclosure as soon as "reasonably practicable."[30] Courts have likewise consistently held that a "prompt" amendment is one made in less than ten calendar days.[31]

The Williams Act's focus on quick investor disclosure was reinforced most recently in 2010, with the passage of the Dodd-Frank Act.[32] The Act gave the SEC the power to shorten the ten-day disclosure timeline if necessary. The Act did not, however, give the SEC the corollary power to lengthen the disclosure period. As Dodd-Frank's sponsors well realized, the disclosure obligations of the Williams Act were designed to ensure that the marketplace received information in a sufficiently fast manner. The calendar-day approach, not the business-day approach, best serves this "legislative plan."[33]

### *Prudential Concerns*

Finally, as has been catalogued in a long-running debate elsewhere,[34] there are significant prudential reasons to favor the calendar-day approach. These reasons dovetail with the statutory

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[26] *See, e.g.*, S. Rep. No. 90-550, at 3 (1967); H.R. Rep. No. 90-1711, at 8 (1968); H.R. Rep. No. 90-1711, at 4 (1968).

[27] *See, e.g.*, S. Rep. No. 90-550, at 2 (1967); *see also GAF Corp* v. *Milstein*, 453 F.2d 709, 717 (2d Cir. 1971) (elaborating on the Williams Act's purpose).

[28] *See Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings Before the Subcomm. on Securities of the S. Comm. on Banking and Currency*, 90th Cong. 136 (1967).

[29] 17 C.F.R. § 240.13d-2.

[30] *In the Matter of Sequa Corp.*, Release No. 26839 (May 19, 1989).

[31] *See Standard Fin., Inc*. v. *LaSalle/Kross Partners, L.P.*, 1997 WL 80946, at *6 (N.D. Ill. Feb. 20, 1997); *D-Z Investment* v. *Holloway*, 1974 WL 440, at *3 (S.D.N.Y. 1974) (seven calendar days is prompt).

[32] Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203, 124 Stat. 1376 § 929R (2010).

[33] *Burwell*, 135 S. Ct. at 2946.

[34] *Compare* Adam O. Emmerich et al., *Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power*, 3 HARV. BUS. L. REV. 135 (2013) (supporting the shortening of disclosure timelines), *with* Lucian A. Bebchuk & Robert J. Jackson, Jr., *The*

and regulatory text, as well as with the Williams Act's history, and should therefore garner more weight than might more legally unmoored policy considerations.

First, a calendar-day approach forces investors to disclose their positions sooner, rather than later. As an example, under the business-day approach an investor who reaches the 5% threshold on May 25, 2019 would have to disclose its position by June 10, 2019—a full seventeen days after the original acquisition. In light of the Williams Act's preference for "prompt" disclosure that "alerts" the marketplace, the shorter, calendar-day approach to calculating Section 13(d)'s timeline should be favored.

Second, changes in technology have rendered even the ten-day timeline outdated.[35] In an age of high/hyper-frequency trading, an investor can acquire significantly more than 5% of a company's assets before the ten-day disclosure window is met. One way to add teeth to Section 13(d)—remember, roughly 50% of filers hover around the ten-day window—is to make clear that the statute requires filing within ten calendar days.

Such a reform offers several advantages. First, it does not require the SEC to promulgate any new rules through the burdensome notice-and-comment process. The agency can, on the weight of the authority discussed, likely make the point quite easily in an interpretive rule. Second, the shorter timeline accords with the Williams Act's text and purpose. And third, the calendar-day approach is more receptive to the realities of modern finance, both given investors' capacity to easily acquire an entity's shares and the fact that after-hours trading renders the business-day approach superficial.

## CONCLUSION

In the hyper-litigated world of corporate law disclosures, clarity is necessary. Fortunately, the text of the Williams Act and the SEC's rules, the history of the Williams Act, and the prudential considerations that justify the disclosure rules all point in the same direction: the calendar-day approach is here to stay. The discord among courts, the SEC, practitioners, and investors should soon come to its end.

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*Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39 (2012) (disagreeing with the proposal to shorten the disclosure period).

35 Emmerich et al., *supra* note 32, at 141 (noting that the "ten-day period provided for in the Section 13(d) rules was fixed in the era of "snail mail" and paper filings").