UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60351 / July 21, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2907 / July 21, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13561

In the Matter of

PERRY CORP.

Respondent

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 and SECTION 203(e) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Perry Corp. ("Respondent" or "Perry").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to Perry Corp. ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

Summary

1. This matter concerns Perry's failure to file a required disclosure statement pursuant to Section 13(d) of the Exchange Act within ten days of acquiring beneficial ownership of more than five percent of the shares of Mylan Laboratories Inc. (now Mylan Inc.) ("Mylan").

2. At the time of Perry's purchases of Mylan shares, Mylan had announced a proposed acquisition, subject to shareholder approval, of King Pharmaceuticals, Inc. ("King"). Perry entered into an investment strategy known as "merger arbitrage," in which Perry would profit from consummation of the merger. The amount of the potential profit depended, at the time the arbitrage position was taken, on the spread in value between the shares of the acquirer and the target company. The spread, in turn, depended on how the market viewed the likelihood that the merger would be consummated. As the likelihood of consummation increased, the spread narrowed and the opportunity for profit diminished.

3. In order to increase the likelihood of consummation, Perry purchased Mylan shares in order to vote the shares in favor of the merger. At the same time, in order to avoid the economic risk of owning Mylan shares, Perry entered into a series of swap transactions designed to hedge fully its financial exposure from owning the Mylan shares. The swap transactions provided that the swap counterparty would reimburse Perry for any decrease in the market price of Mylan shares between the time of Perry's purchase and the time Perry's position was unwound, which had the effect of insulating Perry from movements in the Mylan share price. As a result, Perry acquired the voting rights to nearly ten percent of Mylan's outstanding shares without any economic risk of share ownership. Perry's ability to acquire the voting rights to Mylan shares without disclosure enhanced its ability to profit potentially from its merger arbitrage position.

4. In general, Section 13(d) of the Exchange Act requires any person who has acquired beneficial ownership of more than five percent of a voting class of equity securities registered under Section 12 of the Exchange Act to report such acquisition within ten days. When it exceeded the five percent threshold in September 2004, Perry determined not to file a beneficial ownership disclosure statement after receiving advice from outside counsel that it could defer filing pursuant to Rule 13d-1(b). However, Perry was not entitled to defer filing pursuant to Rule 13d-1(b) because Perry's acquisition of Mylan securities was not "in the ordinary course" of its business. Qualified institutional investors can defer their Section 13(d) reporting obligations in reliance on Exchange Act Section 13(g) and Rule 13d-1(b) thereunder only when they acquire securities as part of their ordinary market making or passive investment activities. When institutional investors, such as Perry, acquire ownership of securities for the purpose of influencing the direction or management of an issuer or affecting or influencing the outcome of a transaction – such as acquiring shares for the primary purpose of voting those shares in a contemplated merger – the acquisition is not made and the shares are not held in the "ordinary course" of business for

purposes of relying on Rule 13d-1(b). By failing to make a timely filing, Perry violated Section 13(d) of the Exchange Act and Rule 13d-1 thereunder.

Respondent

5. **Perry**, a New York corporation headquartered in New York, New York, is a registered investment adviser that provides investment advice and asset management services to five private investment funds. Perry has been registered with the Commission as an investment adviser since April 2000. Perry operates its investment advisory business in the United States principally through Perry Capital, LLC ("Perry Capital"). As of March 30, 2009, Perry had approximately $8.8 billion under management.

The Mylan/King Merger

6. On July 26, 2004, Mylan, one of the nation's largest manufacturers of generic pharmaceutical products, announced an agreement to acquire King, an established brand-name pharmaceutical company. The agreement provided that King shareholders would receive 0.9 shares of Mylan common stock for each outstanding share of King stock, which represented a 61% premium for King shareholders as of the date of the announcement. Pursuant to the terms of the agreement, consummation of the merger was subject to the approval of both Mylan and King shareholders.

7. Perry had invested in King intermittently from October 2001, and beginning in March 2004 had built a significant position in King. As of the close of business on July 23, 2004, Perry had accumulated a total of 4,337,900 shares of King, at an average cost of $15.08 per share. Because King's share price declined between March and July 2004, Perry sustained a paper loss of $20,413,440. On the day of the merger announcement, King's stock price went up almost 25% and Perry could have sold its King shares then and recouped a portion of its trading losses.

8. Following the merger announcement, Perry engaged in "merger arbitrage." Perry tried to maximize its potential profits by converting its King position into a "risk-arbitrage spread" position through the short-sale of a corresponding number of Mylan shares. An arbitrage spread opportunity is created when, as a result of a merger announcement, the securities of the acquiring company (the "acquirer") trade at a higher adjusted price than the shares of the company it seeks to purchase (the "target"). The adjusted price refers to the stock price of the acquirer adjusted for how many shares of the acquirer the target's shares will convert to in the stock-for-stock merger. This pre-completion spread between the adjusted price of the acquirer's shares and the price of the target's shares reflects market uncertainty about deal consummation, *i.e.*, whether the premium offered to the target company will be realized. Thus, the pre-completion spread widens if there are indications that the merger will not be completed. Conversely, the pre-completion spread narrows as confidence grows that the merger will be completed. A transaction designed to take advantage of an arbitrage spread opportunity, called a risk-arbitrage spread trade, is established by acquiring shares of the target and selling short a corresponding number of shares of the acquirer. When the merger is completed, the shares of the target become shares of the acquirer, and these shares can be used by the investor to cover its short-sales of the acquirer's stock. Through these risk-arbitrage

spread trades, investors can profit from the pre-merger spread that resulted from the risk that the transaction would not be completed. If the merger is not completed, no profit is realized from the risk-arbitrage spread transaction and a loss may result.

9. In the five days immediately following the merger announcement, Perry sold short 3,839,500 shares of Mylan (and adjusted its King position) in order to establish a risk-arbitrage spread position, the profitability of which was contingent upon successful completion of the merger. If the merger had been completed at that time, Perry's existing risk-arbitrage spread position – the shares of King it currently held and corresponding Mylan short-sales – would have resulted in a gain to Perry of approximately $14.4 million, off-setting much of its paper loss on King. Perry also continued to increase its King position, such that as of the close of business on August 13, 2004, Perry held 5,152,600 shares of King, representing 2.1% of King's outstanding shares.

Opposition to the Mylan-King Merger

10. On August 18, 2004, a prominent activist investor (the "Activist Investor") and certain entities he controlled (the "Activist Investor Group") received Hart-Scott-Rodino clearance from the Federal Trade Commission to purchase between $100 million and $500 million worth of Mylan shares, representing between 2.4% and 11.9% of Mylan's outstanding common stock. On September 7, 2004, the Activist Investor Group filed a Schedule 13D with the Commission, disclosing that it had acquired 6.8% of Mylan's stock and that it opposed the Mylan-King merger and intended to solicit proxies against it.

11. The Activist Investor Group's Schedule 13D filing signaled that winning Mylan shareholder approval of the merger would be difficult and the market reacted swiftly. Between September 7, when the Activist Investor Group filed its Schedule 13D, and September 17, 2004, when it amended its Schedule 13D to disclose that it held 8.9% of Mylan's stock, the risk-arbitrage spread widened by 59%, from $3.26 to $5.19. The risk-arbitrage spread reflected market uncertainty as to whether the merger would succeed in the face of the Activist Investor's opposition, particularly given that there was no indication that any other large Mylan shareholder supported the merger. If the Activist Investor succeeded in blocking the merger, Perry would lose its anticipated profit from its risk-arbitrage spread trades.

Perry's Acquisition of Voting Rights to Mylan Stock

12. Following the Activist Investor Group's initial Schedule 13D filing, Perry began exploring various ways of acquiring Mylan voting rights without economic risk and without public disclosure. Perry wanted to obtain Mylan stock in order to vote in favor of the merger, and thereby counter the Activist Investor's votes, but did not want to take on the economic risk of owning Mylan shares. In addition, because Perry wanted to profit from a wider risk arbitrage spread, Perry did not want the market to be aware that Perry was building a position to vote in favor of the merger. Had the market known that Perry was acquiring Mylan shares sufficient to offset the Activist Investor Group's position, the spread would have narrowed to reflect the increased likelihood that the merger would be completed, thereby reducing Perry's potential profits on its

spread trades. As a result, Perry researched possible mechanisms through which it could purchase or transfer Mylan stock in transactions which would not be reflected publicly in the market, and obtained pricing on various derivative products which could eliminate or come close to eliminating Perry's economic exposure to the Mylan stock. Perry had never before engaged in a similar strategy to acquire voting rights to a security in order to vote those shares in a merger, without having any economic interest in the shares.

13. On September 8, 2004, a Perry employee contacted a brokerage house specializing in derivative products to inquire about various ways that Perry might be able to purchase Mylan shares while simultaneously obtaining a derivative product to offset the economic risk of owning the stock. The Perry employee also inquired whether there was any way Perry could purchase the Mylan shares without the purchase being publicly reported:

> If we traded like a million shares or two million shares of Mylan … would it print, or would we have to see it hit the tape? … [C]ould you print on like a consolidated tape at like 6:30 at night tonight or something, so that way it never really hits our tape.[1] … You know what I mean, like, there's exchanges in the Caymans, there's exchanges in London. … Ask your [brokerage trader] what is the most discreet way to print this … and call me back.[2]

14. Thereafter, on September 10, a second Perry employee had several telephone calls with Perry's contact at an investment bank. During the calls, the Perry employee first asked who would see trades printed on the consolidated tape, and the bank representative expressed his understanding that trades done after 6:30 p.m. were reported only to the relevant exchange and not to the market as a whole. The Perry employee then asked: "So if we wanted to cross stock with you guys and have it print on a consolidated tape after 6:30, is that something that you guys would be willing to do for us?" The bank representative responded, "You mean you're doing it in a swap?" The Perry employee explained that Perry wanted to do it as a cross, which the bank representative rejected as not a "real trade." The Perry employee then asked, "So we could do it in swaps, you're saying. We could do it in swaps?" The bank representative responded that he thought they could. Minutes later, the Perry employee instructed the bank to begin looking into transactions whereby Perry would acquire Mylan shares in 500,000 to 1 million share lots, every few days, after 6:30 p.m. to avoid public disclosure while eliminating Perry's risk through "swap" agreements with the bank.

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[1] This conversation demonstrates Perry's understanding of then-existing trade reporting requirements. During the relevant period, over-the-counter ("OTC") trades made between 6:30 p.m. and midnight were reported to an NASD facility on the next trading day and marked "as of." Trades reported in this way were not disseminated to the public. By contrast, trades that took place during regular business hours involved trade reports that were immediately publicly disseminated.

[2] A "print" is an industry term for trade reporting.

15. Starting on September 8, 2004, Perry acquired 26.6 million shares, or 9.89% of Mylan's shares, to vote in favor of the Mylan-King merger and to counter the Activist Investor's opposition. Perry purchased 5.6 million of these Mylan shares in regular open-market transactions.[3] Perry acquired the remaining 21 million shares from, and engaged in a complex series of "swap" transactions with, two banks (collectively, the "Banks") that gave Perry voting rights to Mylan shares while eliminating Perry's economic risk of holding the shares.

16. The Banks borrowed and short-sold to Perry 21 million shares of Mylan stock, in blocks of 1 million to 2 million shares, which Perry purchased in foreign markets or after hours on the OTC market. Perry took several steps to ensure that the transactions would be hidden from the market. First, because the Banks were borrowing the shares, the transfer of the shares from the investors who owned them to the Banks did not hit the tape. Second, and more important, Perry instructed the Banks to conduct the Mylan short-sales in foreign markets or as OTC trades after hours so those trades also would not be disseminated to the public. By structuring the transactions this way, these trades were not reported by any volume-reporting or other public dissemination services, even though on many days Perry's share purchases eclipsed the total volume of all Mylan shares reported to have been purchased through all reporting exchanges. Thus other market participants were unaware that Perry was obtaining a very large voting interest in Mylan that could be used to counter the Activist Investor's opposition to the merger.

17. At the same time as it was acquiring its long position in Mylan through short sales by the Banks, Perry was executing "swap" agreements with the Banks tied to the underlying Mylan shares Perry was purchasing from the Banks. The "swaps" were governed by ISDA (International Swap Dealers Association) Master Agreements, with the specific terms of each transaction set forth in a "confirmation." These "swaps" were synthetic transactions tied to the price of the underlying security. Essentially, the parties to a "swap" transaction agree to pay one another the difference between the price of the underlying security at origination and termination, with one party being obligated to make payments if the price goes up, and the other obligated to make payments if the price goes down. In this case, the "swap" transactions had the effect of insulating both parties from movements in the price of the underlying stock, Mylan. Because the Banks were

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[3] From September 8 through September 10, 2004, the days in which it was exploring alternative mechanisms, Perry purchased 2,883,900 shares of Mylan through the New York Stock Exchange, all of which shares were offset by short sales Perry already had in Mylan, but did not cover its short position using these Mylan long purchases. Perry purchased another 2,742,400 shares in standard market transactions from September 23 through October 13, 2004, again offsetting these shares with Mylan shares it sold short as part of its risk-arbitrage position. Although an investor typically would "cover" a short position and close out the short (and stop paying financing fees to the bank through whom it was executing the short), Perry kept both positions open – long Mylan and short Mylan – thereby paying financing fees to its prime brokers for its existing short position while retaining the right to vote the shares purchased to cover the short. Payment of these unnecessary financing costs, which totaled $5.7 million, was consistent with Perry's purpose in purchasing the Mylan shares solely for voting rights, further demonstrating the lack of any independent economic rationale for Perry's acquisition of Mylan stock.

borrowing the shares that they sold short to Perry, the Banks would be at risk if the price of Mylan stock was up at the time the Banks needed to cover their short positions. At the same time, Perry – which was long the 21 million shares – would be at risk if the price of Mylan stock was down at the time Perry wished to unwind its position. The "swaps" guaranteed both parties against these potential losses: through the "swap" Perry agreed to reimburse the Banks for the difference between the price at which the Banks short-sold the Mylan shares to Perry and the market price at the time the transaction was unwound, if the market price at that time was higher, and the Banks agreed to reimburse Perry for the difference between the price Perry paid for the stock and the market price at the time the transaction was unwound, if the market price at that time was lower. The "swap" agreements effectively eliminated any economic risk Perry had from owning Mylan shares. As a result of the "swap" transactions, neither Perry nor the Banks were at risk of any movement in the price of Mylan stock.

18. By entering into these "swap" transactions, Perry was able to acquire the voting rights to nearly ten percent of Mylan's stock without having any economic risk and no real economic stake in the company. Moreover, Perry was able to do this without making a significant financial outlay. Perry financed its purchase of Mylan stock through an extension of its existing margin line of credit at its prime broker. For each purchase of Mylan stock, in the three days between trade date and settlement date, Perry drew upon its margin account to have enough cash deposited into its cash account to satisfy payment for the long position. The funds were then transferred to the Banks by the settlement date. In total, Perry paid less than $7.2 million to its prime broker to finance the purchase of 26.6 million Mylan shares, worth approximately $492 million. Perry also earned interest on its short positions and on the collateral it gave to the Banks for the "swaps." As a result, accounting for all of Perry's costs and also the interest it earned on its various positions, Perry paid only $5.76 million to acquire voting rights to almost ten percent of Mylan's shares.[4]

19. While Perry was engaging in its Mylan strategy of essentially buying votes, it was simultaneously adding to its risk-arbitrage spread position by purchasing additional King shares and continuing to short Mylan shares. As of November 11, 2004, the day on which Perry held its largest King position, Perry stood to capture an additional $21.8 million gain on the further risk-arbitrage spread trades it had made since September 7.[5] If the merger had been consummated that

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[4] The Banks profited from this transaction through commissions earned and financing fees charged for establishing the swap positions. The Banks also benefited by virtue of holding a total of $448,074,500 in funds obtained from Perry while the position was open, in what can be described as an extremely low interest loan from Perry to the Banks. The Banks received $389,630,000 for the 21 million shares of Mylan the Banks short-sold to Perry, as well as $58,444,500 in collateral that Perry posted for the swaps. Although Perry earned the nominal federal funds rate from the Banks on its collateral payment, the Banks were free to earn more on the total amount of $448,074,500.

[5] By the close of business on September 7, 2004, Perry held 5,146,800 shares of King, which it had converted into risk-arbitrage spread positions by short-selling Mylan stock, and stood to earn at least $19.97 million on this position if the merger were to be consummated,

day, Perry's July 26, 2004 $20.4 million paper loss on its 4,337,900 share King position would have turned into a net profit of $21.3 million on its 8,594,700 share King risk-arbitrage spread position – a $41.7 million swing. Had the market known that Perry was acquiring voting rights in Mylan shares sufficient to offset the Activist Investor's Mylan position, the spread between the price of King and the price of Mylan would have been narrower. Because the market was unaware of Perry's position and conduct, however, Perry was able to not only protect its existing potential arbitrage-spread gain, but also further profit by engaging in additional risk-arbitrage spread trades at artificially wide spreads.

Perry's Failure to File Required Reports

20. On September 20, 2004, Perry was approaching the five percent ownership threshold triggering reporting obligations pursuant to Section 13(d) of the Exchange Act and Rule 13d-1 thereunder. To determine whether it was required to file a Schedule 13D disclosing its Mylan position, Perry sought advice from outside counsel at two different law firms. First, Perry personnel contacted outside counsel from the law firm that routinely handled Perry's public filings, including its Section 13 filings ("Lawyer A"). Lawyer A advised Perry that, ordinarily in a merger situation, his initial reaction and general bias was that Perry should file a Schedule 13D.

21. Perry personnel then contacted another lawyer, who had previously provided advice to Perry on various mergers and acquisition matters ("Lawyer B") – including advice in August 2004 concerning the Activist Investor's acquisition of Mylan shares. Without informing Lawyer B that Perry previously had consulted with Lawyer A, Perry asked Lawyer B, who had not previously handled any of Perry's Section 13 filings, for his legal advice concerning Perry's Schedule 13D filing obligations. After discussing the matter with Perry, Lawyer B advised by email that Perry could defer filing "assuming the purchase of Mylan shares is [in the] ordinary course":

> I think you're ok filing a 13G if you are acquiring the securities in the ordinary course of business and not with a view toward, or as part of a plan having the purpose or effect of, changing or influencing control of Mylan. My understanding of the deal is that it is a reverse triangular merger, with a subsidiary of Mylan merging into King, and that there will be no change in the Mylan board as a result of the merger. So, assuming the purchase of Mylan shares is ordinary course for Perry (and I'm not sure why it would not be), I think you can file a 13G if a filing is necessary.

22. Perry personnel then informed Lawyer A that Lawyer B had opined that Perry did not have to file a Schedule 13D because it was acquiring an interest in the acquirer, not the target company. After discussing the issue, Lawyer A agreed that, in general, Perry's ownership in an acquiring company would not amount to "influencing control" under Rule 13d-1(b)(1)(i) of the Exchange Act and therefore would not automatically trigger a Schedule 13D filing obligation.

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reducing Perry's pre-merger announcement paper loss on its King position from $20.4 million to $443,000.

23. In opining upon Perry's reporting obligations, neither attorney specifically considered whether Perry's vote-buying strategy was in the ordinary course of Perry's business. Perry's counsel did not ask questions or follow up with Perry concerning whether Perry's strategy was in the ordinary course of Perry's business. Nor did Perry conduct any internal assessment or follow up with counsel for legal advice on this issue. By the close of business on September 24, 2004, Perry had acquired 16.2 million shares of Mylan, representing more than five percent of Mylan shares. Pursuant to Section 13(d), Perry was required to disclose its acquisition within ten days, that is, by October 3, 2004.

Perry's Untimely Schedule 13D Filing

24. On November 19, 2004, the Activist Investor announced that he intended to make a $20 per share tender offer for Mylan. Shortly thereafter, at the end of the day on November 22, 2004, a news article was published that speculated that Perry and other hedge funds had taken positions in Mylan to vote in favor of the merger and capture the significant risk arbitrage spread, without having any economic interest in the company or exposure to Mylan's stock price.

25. On November 23, 2004, Perry consulted with counsel at a third law firm ("Lawyer C"), who opined that Perry should file a Schedule 13D in light of the Activist Investor's tender offer. Lawyer C opined that because of the tender offer, Perry now could be said to hold its Mylan shares with the purpose or effect of changing or influencing the control of Mylan. On November 29, 2004, Perry filed a Schedule 13D disclosing its Mylan position, more than two months after Perry had acquired more than five percent of Mylan shares.[6]

26. The Mylan/King merger was not completed for reasons unrelated to the above-described trading. On December 8, 2004, King announced that it would have to restate earnings for 2002, 2003 and the first six months of 2004. On February 27, 2005, Mylan and King announced that they had mutually agreed to terminate the proposed merger because they were "not able to agree upon terms for a revised transaction."

Violations

27. Section 13(d) of the Exchange Act and Rule 13d-1 thereunder generally require any person who has acquired beneficial ownership of more than five percent of a voting class of equity securities registered under Section 12 of the Exchange Act to report such acquisition on Schedule 13D within ten days after such acquisition. However, as an alternative, the rules allow the use of short-form disclosure statements with differing timing requirements under certain conditions. Rule 13d-1(c) provides that, in lieu of filing a Schedule 13D, any person may file a short-form statement

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[6] On November 12, 2004, Perry filed a Schedule 13F disclosing among its holdings in 216 different companies that it owned over 16.9 million shares of Mylan as of September 30, 2004. Filing a required Schedule 13F does not relieve persons from their obligations with respect to filing Schedule 13D, which requires the disclosure of more detailed information than a Schedule 13F.

on Schedule 13G within ten days after the triggering acquisition (a "10-Day 13G"), so long as that person "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," and is not directly or indirectly the beneficial owner of twenty percent or more of the class of securities. In addition, Rule 13d-1(b) provides that, in lieu of filing a Schedule 13D, certain qualified institutional investors may file a short-form statement on Schedule 13G within 45 days after the end of the calendar year in which they made the triggering acquisition (a "45-Day 13G"), so long as the institutional investor acquired the securities "in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect."[7]

28. The institutional investors that can avail themselves of the more liberal timing requirements of the 45-Day 13G include broker-dealers, banks, insurance companies, investment companies, and persons registered as investment advisers. An institutional investor that does not meet the "ordinary course of business" requirement for filing a 45-Day 13G can still file a 10-Day 13G, in lieu of a Schedule 13D, so long as it meets the requirements of Rule 13d-1(c).[8]

29. The filing requirements of Section 13(d) of the Exchange Act were adopted for the twofold purposes of "(i) providing adequate disclosure and other protections to stockholders in connection with takeover attempts, such as tender offers, and corporate repurchases, and (ii) providing adequate disclosure to stockholders in connection with any substantial acquisition of securities within a relatively short period of time." Exchange Act Release No. 13291, 42 Fed. Reg. 12342, 12343 n.2 (Mar. 3, 1977); see also GAF Corp. v. Milstein, 453 F.2d 709, 717 (2d Cir. 1971) ("the purpose of section 13(d) is to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control"); SEC v. Drexel Burnham Lambert, Inc., 837 F. Supp. 587, 607 (S.D.N.Y. 1993) (citing cases).

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7 Under Rule 13d-1(b), qualified institutional investors who meet these tests need not file a 45-Day 13G unless they beneficially own more than five percent of a class of equity securities as of the end of the calendar year in which they acquired the securities. Rule 13d-1(b)(2).

8 See, e.g., Exchange Act Release No. 34-37403, 1996 WL 374621, at *6 (July 3, 1996) ("Even where an institutional investor is unable to make the 'ordinary course of business' certification [under Rule 13d-(1)(b)(1)] it would still be permitted to file on Schedule 13G under the Passive Investor provision so long as it does not have [beneficial ownership of equal to or greater than 20% of the outstanding class or acquire or hold the securities with] a disqualifying purpose or effect.") Perry never filed a Schedule 13G pursuant to Rule 13d-1(c) and therefore was legally precluded from satisfying its beneficial ownership reporting obligation by claiming that it was a "Passive Investor" as defined in Exchange Act Release 39538, (January 12, 1998) at footnote 9.

30. "Section 13(d) is not a mere 'technical' reporting provision; it is, rather, the 'pivot' of a regulatory scheme that may represent the only way that corporations, their shareholders and others can adequately evaluate . . . the possible effects of a change in substantial shareholdings." Drexel, 837 F. Supp. at 607 (internal citations omitted); see also H.R.Rep. No. 1711, 90th Cong., 2d Sess., at 8 (1968), reprinted in 1968 U.S.C.C.A.N. 2811, 2818 ("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."); SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (a violator of Section 13(d) improperly benefits by purchasing stock at an artificially low price, because disclosure of a holding in excess of five percent of a company's stock suggests to the rest of the market a likely takeover and therefore may increase the price of the stock). Proof of scienter is not required to establish a violation of this reporting provision. See, e.g., SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1167 (D.C. Cir. 1978).

31. Section 13(d) and Section 13(g) are broad disclosure statutes. The availability of a short-form Schedule 13G is designed to ensure adequate disclosure to the marketplace while minimizing the burden on passive investors who would otherwise be required to complete a comprehensive Schedule 13D filing. All persons other than "Exempt Investors" filing pursuant to Exchange Act Rule 13d-1(d)[9] who avail themselves of Schedule 13G must certify that they have acquired the subject securities with a passive investment purpose.[10] Qualified institutional investors can defer their initial beneficial ownership reporting obligations by relying on Rule 13d-1(b) only if they can additionally certify that they have acquired the subject securities in the "ordinary course of [their] business."

32. The "ordinary course of business" provision was first added to Section 13(d) by Congressional amendment in 1970. The purpose of the amendment was to allow the Commission to exempt broker-dealers and stock exchange specialists acquiring the specified percentage of securities in the ordinary course of trading or market making activities from the more rigorous disclosure provisions of Schedule 13D. See, e.g., H.R. Rep. No. 91-1655, 91st Cong., 2d Sess. (1970) at 4-5 ("The Committee amendment adds a new paragraph to Section 13(d) of the Act to grant clearly to the Commission authority to permit simpler reporting for persons who, although acquiring more than 5 percent of any equity security, have done so in the ordinary course of business and have not acquired the shares for the purpose of changing or influencing the control of the issuer. Acquisitions by stock exchange specialists, over-the-counter marketmakers, and

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[9] The types of investors who may file on Schedule 13G pursuant to Rule 13d-1(d) are described as "Exempt Investors" and are identified in footnote 8 in Exchange Act Release 39538 (January 12, 1998). "Exempt Investors" who, as of the end of a calendar year, beneficially own more than five percent of a class of equity securities are required to file Schedule 13G within 45 days after the end of the calendar year but are not required to certify that the securities were acquired either in the "ordinary course of business" or with a passive investment purpose. Rule 13d-1(d). Perry was not an Exempt Investor.

[10] See Rules 13d-1(b)(1)(i) and 13d-1(c)(1).

investment companies might well fall within the class of persons to which this amendment addresses itself.").[11]

33. Here, Perry engaged in a series of transactions in order to acquire voting rights to a large block of Mylan stock for the exclusive purpose of voting the shares in a merger and influencing the outcome of the vote. Perry's acquisition of Mylan shares was not made in order to invest in, or profit from, ownership of the Mylan shares. Irrespective of whether transactions of this type are routine for an institutional investor, reliance on Rule 13d-1(b)(1)(i) based on the "ordinary course of business" provision is inappropriate when transactions of the type executed by Perry are undertaken. The exception to the ordinary 10-day disclosure requirements of Section 13(d) for qualified institutional investors is available only where such investors are acquiring securities for passive investment or ordinary market making purposes as part of their routine business operations.[12]

34. When institutional investors acquire, directly or indirectly, the beneficial ownership of securities with the purpose of influencing the management or direction of the issuer or affecting or influencing the outcome of a transaction – such as acquiring securities, or an interest in securities, for the purpose of voting those securities in favor of a merger – the acquisition of those securities cannot be said to be in the "ordinary course of [the institutional investor's] business" for purposes of relying on Rule 13d-1(b) or making the certification under Item 10 of Schedule 13G. To the extent a qualified institutional investor, such as Perry, acquired shares outside of its ordinary course of business, Section 13(d) filing obligations automatically arise. Similarly, when institutional investors rapidly accumulate securities of an acquirer after the announcement of a business combination transaction with the intent to ensure completion of a merger by the acquirer, the legislative purpose of Section 13(d) is defeated in the absence of full disclosure. When such acquisitions are made, or when such institutional investors act in concert with the management or advisors of one of the parties to the transaction to ensure completion of the merger, those institutions are ineligible to certify that the securities were acquired and are held in the "ordinary course of [the institutional investor's] business" for purposes of relying upon Exchange Act Rule 13d-1(b) to defer the filing of a beneficial ownership report.

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[11] See also, Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen: Hearing on S. 336 and S. 3431 Before the Subcomm. on Secs. of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. (1970) at 13, 103, 111, 113, 116 (discussing securities industry proposals to provide an exemption from the Section 13(d) disclosure provisions for broker-dealers and stock exchange specialists acquiring the specified percentage of securities in the course of normal market-making activities); 91 P.L. 567 (Dec. 22, 1970) (amending Section 13(d) to insert new subparagraph (5)). The "ordinary course of business" provision was incorporated in the rules allowing the use of the short-form Schedule 13G upon their adoption in 1978. Exchange Act Release No. 34-14692, 1978 WL 170898 (April 21, 1978).

[12] See, e.g., In the Matter of JWGenesis Financial, Inc., Release No. 34-43053, 2000 WL 987730 (July 19, 2000); Blunt, Ellis and Loewi, Inc., SEC No-Action Letter, 1988 WL 234209, at *1 (April 15, 1988).

35. Because Perry did not acquire the Mylan securities in the ordinary course of its business, it was not eligible to file a Schedule 13G and was instead required to disclose its acquisition within 10 days.

36. As a result of the conduct described above, Perry willfully[13] violated Section 13(d) of the Exchange Act and Rule 13d-1 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Perry's Offer.

Accordingly, pursuant to Section 21C of the Exchange Act and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Perry shall cease and desist from committing or causing any violations and any future violations of Section 13(d) of the Exchange Act and Rule 13d-1 thereunder.

B. Respondent Perry is censured.

C. Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $150,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Perry as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Rosenfeld, Associate Regional Director, New York Regional Office, Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281.

By the Commission.

Elizabeth M. Murphy
Secretary

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[13] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" Id. (quoting Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).