

Question 105.06

Question: Certain shareholders have entered into a voting agreement under which each shareholder agrees to vote the shares of a voting class of equity securities registered under Section 12 that it beneficially owns in favor of the director candidates nominated by one or more of the other parties to the voting agreement. Under [RuleSection 13\(d-5\)\(b3\)](#), the shareholders have formed a group [because given that](#) they have agreed to act together for the purpose of voting the equity securities of the issuer. Under what circumstances is the beneficial ownership of a party to the voting agreement attributed to one or more other parties to the agreement?

Answer: The formation of a group under [RuleSection 13\(d-5\)\(b3\)](#), without more, does not result in the attribution of beneficial ownership to each group member of the securities beneficially owned by other members. Under Section 13(d)(3) of the Exchange Act, ~~the~~[this](#) group is treated as a new “person” for purposes of Section 13(d)(1); and ~~the group~~ is deemed to have acquired, [by due to the agreement among its members and corresponding](#) operation of Rule 13d-5(b), beneficial ownership of the shares beneficially owned by its members. (Note that the analysis is different for Section 16 purposes. See Section II.B.3 of Exchange Act Release No. 28869 (February 8, 1991).)

In order for one party to the voting agreement to be treated as having or sharing beneficial ownership of securities held by any other party to the voting agreement, evidence beyond formation of the group under [RuleSection 13\(d-5\)\(b3\)](#) would need to exist. For example, if a party to the voting agreement has the right to designate one or more director nominees for whom the other parties have agreed to vote, the party with that designation right becomes a beneficial owner of the securities beneficially owned by the other parties under Rule 13d-3(a), ~~because if~~ the agreement gives that person the power to direct the voting of the other parties’ securities. Similarly, if a voting agreement confers the power to vote securities pursuant to a bona fide irrevocable proxy, the person to whom voting power has been granted becomes a beneficial owner of the securities under Rule 13d-3. See ~~Q & A No. Example 7 to~~[in](#) Exchange Act Release No. 13291 (February 24, 1977). Conversely, parties that do not have or share the power to vote or direct the vote of other parties’ shares would not beneficially own such shares solely as a result of entering into the voting agreement. Note, however, that a contract, arrangement, understanding or relationship concerning voting or investment power among parties to the agreement, other than the voting agreement itself, may result in a party to the voting agreement having or sharing beneficial ownership of securities held by other parties to the voting agreement under Rule 13d-3. [~~Jan. 3, 2014~~ [July 11, 2025](#)]