

## A Critical Study of Disgorgement of Short-Swing to the Spouse

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### Abstract

In general, beneficial ownership of securities under the Securities Exchange Act depends on whether a shareholder has the power either to vote the securities or to dispose of them. The FSC has adopted this definition for purpose of determining ownership by 10 percentage shareholder. According to Securities Exchange Act §22-2(3), this means that spouse and other family members (even if they share pecuniary benefits) are not the beneficial owners of each other's stock for §22-2(3) purpose unless that can control its voting or disposition. This regulatory definition deviates from that adopted by some early courts which focused on whether the shareholder shared in the pecuniary benefits of ownership.

The critical issue that Securities Exchange Act §157(5) shall apply to §22-2(3) is whether wife and husband are treated as a single beneficial owner. If so, their individual 6 percent holdings would be combined. As a beneficial owner of more than 10 percentage, the purchases by husband would be matched with the sale by wife to produce a recoverable profit. In each case, they beneficially owned more than 10 percent immediately before the transaction. If, however, they are not the beneficial owner of the other's shares, neither can be liable because neither individually surpassed the 10 percent threshold.

About this issue, we could consult Securities Exchange Act of 1934. According to the SEC, holdings of shareholders percent must be aggregated if one shareholder has voting or disposition control over the other's shares. Rule 16a-1(a)(for the purpose of determining whether shareholder own more than 10 percent, look to investment/voting control rule). In this case, unless husband or wife had control over the other's shares, there would be no beneficial ownership.

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This is an unusual result, which essentially permits family members to hold and trade outside the strictures of §16 so long as no family member holds more than 10 percent of the company's stock and they do not enter into any arrangement to vote or dispose of the others' stock. This means that even if husband and wife share the financial benefits of ownership, they are not deemed to be beneficial owners of each other's shares, making their transactions unmatchable.

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