

ALERTS

New Schedule 13D/G C&DIs Published by SEC Staff Regarding Shareholder Engagement and Active/Passive Status

February 13, 2025

On Feb. 11, 2025, the staff of the Division of Corporation Finance at the Securities and Exchange Commission published revisions to existing Securities and Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Compliance and Disclosure Interpretation (C&DI) Question 103.11 and published new Question 103.12 regarding how engagement with issuers may affect a beneficial owner's active/passive status.[1]

While the new C&DI maintains that facts and circumstances are critical in determining a shareholder's eligibility to report on Schedule 13G, investors should carefully consider this new Staff guidance. The new C&DI appears aimed at asset managers that share social, environmental, political or governance related policies with an issuer and couple their expressions of policy with explicit or implicit statements related to withholding support from the issuer's board candidates. It is notable that the C&DI changes are consistent with acting Chairman Mark T. Uyeda's Remarks at the 2022 Cato Summit on Financial Regulation.[2]

As always, engagement teams should carefully consider how they integrate expressions of policy and voting intentions/decisions into discussions with any issuer.

See below for the full text of the changes to C&DI 103.11 and new C&DI 103.12.

Question 103.11

- **Question:** The Hart-Scott-Rodino (“HSR”) Act provides an exemption from the HSR Act’s notification and waiting period provisions if, among other things, the acquisition of securities was made “solely for the purpose of investment,” with the acquiror having “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.” 15 U.S.C. 18a(c)(9); 16 C.F.R. 801.1(i)(1). Does the fact that a shareholder is disqualified from relying on this HSR Act exemption due to its efforts to influence management of the issuer on a particular topic, by itself, disqualify the shareholder from initially reporting, or continuing to report, beneficial ownership on Schedule 13G?
- **Answer:** The inability to rely on the HSR Act exemption alone would not preclude a shareholder from filing on Schedule 13G in lieu of the Schedule 13D otherwise required. Instead, eligibility to ~~use~~ report on Schedule 13G ~~under Exchange Act~~ in reliance on Rule 13d-1(b) or Rule 13d-1(c) will depend, among other things, on whether the shareholder acquired or is holding equity ~~the subject~~ securities with the purpose or effect of changing or influencing control of the issuer. This determination is based upon all the relevant facts and circumstances. and will be informed by the meaning of “control” as defined in Exchange Act Rule 12b-2. [Feb. 1], 2025]
- The subject matter of the shareholder’s discussions with the issuer’s management may be dispositive in making this determination, although the context in which the discussions occur is also highly relevant. For example:
- Generally, engagement with an issuer’s management on executive compensation and social or public interest issues (such as environmental policies), without more, would not preclude a shareholder from filing on Schedule 13G so long as such engagement is not undertaken with the purpose or effect of changing or influencing control of the issuer and the shareholder is otherwise eligible to file on Schedule 13G. *See* Release No. 34-39538 (Jan. 12, 1998) (stating that a shareholder’s proposal or soliciting activity relating to such topics generally would not cause a loss of Schedule 13G eligibility).
- Engagement on corporate governance topics, such as removal of staggered boards, majority voting standards in director elections, and elimination of poison pill plans, without more, generally would not disqualify an otherwise eligible shareholder from filing on Schedule 13G if

~~the discussion is being undertaken by the shareholder as part of a broad effort to promote its view of good corporate governance practices for all of its portfolio companies, rather than to facilitate a specific change in control in a particular~~

- ~~By contrast, Schedule 13G would be unavailable if a shareholder engages with the issuer's management on matters that specifically call for the sale of the issuer to another company, the sale of a significant amount of the issuer's assets, the restructuring of the issuer, or a contested election of directors. [July 14, 2016]~~

Question 103.12

- **Question:** Shareholders filing a Schedule 13G in reliance on Rule 13d-1(b) or Rule 13d-1(c) must certify that the subject securities were not acquired and are not held “for the purpose of or with the effect of changing or influencing the control of the issuer.” Under what circumstances would a shareholder’s engagement with an issuer’s management on a particular topic cause the shareholder to hold the subject securities with a disqualifying “purpose or effect of changing or influencing control of the issuer” and, pursuant to Rule 13d-1(e), lose its eligibility to report on Schedule 13G?
- **Answer:** The determination of whether a shareholder acquired or is holding the subject securities with a purpose or effect of “changing or influencing” control of the issuer is based on all the relevant facts and circumstances and will be informed by the meaning of “control” as defined in Exchange Act Rule 12b-2.

The subject matter of the shareholder’s engagement with the issuer’s management may be dispositive in making this determination. For example, Schedule 13G would be unavailable if a shareholder engages with the issuer’s management to specifically call for the sale of the issuer or a significant amount of the issuer’s assets, the restructuring of the issuer, or the election of director nominees other than the issuer’s nominees.

In addition to the subject matter of the engagement, the context in which the engagement occurs is also highly relevant in determining whether the shareholder is holding the subject securities with a disqualifying purpose or effect of “influencing” control of the issuer. Generally, a shareholder who discusses with management its views on a particular topic and how

its views may inform its voting decisions, without more, would not be disqualified from reporting on a Schedule 13G. A shareholder who goes beyond such a discussion, however, and exerts pressure on management to implement specific measures or changes to a policy may be “influencing” control over the issuer. For example, Schedule 13G may be unavailable to a shareholder who:

- recommends that the issuer remove its staggered board, switch to a majority voting standard in uncontested director elections, eliminate its poison pill plan, change its executive compensation practices or undertake specific actions on a social, environmental or political policy and, as a means of pressuring the issuer to adopt the recommendation, explicitly or implicitly conditions its support of one or more of the issuer’s director nominees at the next director election on the issuer’s adoption of its recommendation; or
- discusses with management its voting policy on a particular topic and how the issuer fails to meet the shareholder’s expectations on such topic, and, to apply pressure on management, states or implies during any such discussions that it will not support one or more of the issuer’s director nominees at the next director election unless management makes changes to align with the shareholder’s expectations. [Feb. 11, 2025]

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] SEC.gov | Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting.

[2] SEC.gov | Remarks at the 2022 Cato Summit on Financial Regulation

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