

SEC Provides New Guidance on Schedule 13G Eligibility

February 13, 2025

On February 11, 2025, the staff of the Division of Corporation Finance of the Securities and Exchange Commission issued a new [Compliance and Disclosure Interpretation](#)¹ (“C&DI”) regarding the eligibility of shareholders to file beneficial ownership reports on Schedule 13G. The C&DI addresses the circumstances in which a shareholder’s engagement with an issuer’s management on a particular topic would cause the shareholder to be deemed to hold the subject securities with the “purpose or effect of changing or influencing control of the issuer”—thereby losing its eligibility to report on Schedule 13G.

Background. Under Rule 13d-1(b) and Rule 13d-1(c) of the Securities Exchange Act of 1934, as amended (“Exchange Act”), a shareholder may report its beneficial ownership of equity securities on Schedule 13G if, among other requirements, it certifies that such securities were not acquired or held with the purpose or effect of changing or influencing the control of the issuer.² Failure to satisfy this condition (and assuming an inability to rely on Rule 13d-1(d)) would require the shareholder to report its beneficial ownership on Schedule 13D.

Prior SEC guidance (C&DI Question 103.11, last updated July 14, 2016) stated that engagement with the issuer’s management, without more, on topics such as executive compensation and social policies would not mean that a shareholder acquired or held the securities with a purpose or effect of “changing or influencing” control of the issuer. Similarly, engagement on corporate governance topics, such as staggered boards, majority voting standards and poison pills, would not disqualify a shareholder from

¹ Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, C&DI Question 103.12.

² Under Rule 13d-1(b), a shareholder must also have acquired the securities in the ordinary course of business and qualify as one of the enumerated types of qualified institutional investors, which include banks, insurance companies, registered investment companies and pension funds. Under Rule 13d-1(c), a shareholder must also not beneficially own more than 20% of the class of securities. Alternatively, a shareholder may report its beneficial ownership of equity securities on Schedule 13G, irrespective of its control intent, under Rule 13d-1(d) if it acquired the subject securities before the issuer was subject to the reporting requirements of the Exchange Act (e.g., prior to the issuer’s initial public offering) and has not acquired more than 2% of the class of securities over the prior 12 months.

relying on Rule 13d-1(b) or Rule 13d-1(c) to file on Schedule 13G so long as the discussion was part of a broad effort to promote particular governance practices for all companies rather than to facilitate a change in a particular company. In contrast, under the prior guidance, Rule 13d-1(b) and Rule 13d-1(c) would not be available to a shareholder that engages with the issuer's management on particular "control" transactions, such as the sale of the issuer, the sale of a significant amount of assets, a restructuring or a contested election of directors.

New Guidance. The new C&DI takes a broader view as to what constitutes a disqualifying "purpose or effect of changing or influencing control of the issuer" for purposes of Rule 13d-1(b) and Rule 13d-1(c).

First, the C&DI states that the specific topics on which a shareholder engages with the issuer's management may be dispositive in determining whether the securities are held with a purpose or effect of "changing or influencing" control, citing as examples the same types of transactions mentioned in the prior guidance (e.g., sale of the issuer, the sale of a significant amount of assets, a restructuring or a contested election of directors). In this respect, the C&DI mirrors the prior guidance, which provides that engagement, in any form, on such topics precludes reliance on Rule 13d-1(b) and Rule 13d-1(c).

Second, the C&DI notes that the context in which a shareholder's engagement with management occurs is highly relevant in determining whether a shareholder's holding of securities has a purpose or effect of influencing control of the issuer. According to the C&DI and consistent with prior guidance, a shareholder who merely discusses its views on a topic and how these views may influence their voting decisions, without more, would not be disqualified from relying on Rule 13d-1(b) or Rule 13d-1(c).

The C&DI then expands upon the prior guidance and discusses specific actions or situations that could be deemed to influence control over the issuer. The C&DI notes that, generally, a shareholder that discusses its views with management as to specific measures or policy changes and also exerts pressure on management to implement such matters may be deemed to be influencing control. Specifically, in the context of either a specific recommendation to an issuer on governance or policy matters, or discussions with management on a shareholder's voting policy that may be inconsistent with the issuer's policies, if a shareholder 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 policy changes, a shareholder may be disqualified from relying on Rule 13d-1(b) and Rule 13d-1(c).

Takeaway. The C&DI represents a shift from the prior guidance as to the nature of a shareholder's engagement with an issuer that may constitute influencing control, such

that Rule 13d-1(b) or Rule 13d-1(c) may not be relied upon for filing Schedule 13G. In particular, while the prior guidance simply noted that engagement, “without more,” was not disqualifying (other than for engagement on clear “control” transactions), the new C&DI indicates that disqualifying conduct may be in the form of exerting actual pressure on an issuer, including in the form of conditioning support of issuer-nominated directors on the adoption of the shareholder’s recommendations. As a result, institutional shareholders that currently file on Schedule 13G and whose voting policies state that they will withhold support for incumbent directors at companies with policies inconsistent with their own may now be reluctant to engage with management if doing so would require them to file on Schedule 13D.

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Please do not hesitate to contact us with any questions regarding beneficial ownership reporting on Schedule 13G or Schedule 13D.



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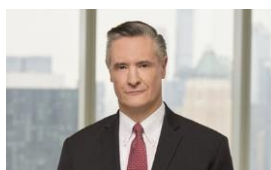
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