

SEC Staff Issues New Guidance Regarding Schedule 13D/G



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On February 11, 2025, the SEC staff published updates to two Compliance and Disclosure Interpretations (C&DIs) regarding the availability of Schedule 13G to certain investors, specifically concerning activities that could preclude an investor from reporting on Schedule 13G in certain circumstances. The C&DIs have been updated to revise Question 103.11 and include a new Question 103.12, the text of which are reproduced below.

Under the SEC rules, when any person directly or indirectly acquires more than five percent of a class of a public company's equity securities, that person must file a Schedule 13D with the SEC unless they qualify to file the shorter-form Schedule 13G. One category of persons who qualify to file on Schedule 13G are so-called "passive" investors who do not hold a company's equity securities "with the purpose or effect of changing or influencing the control of the issuer."

Traditionally, the SEC permitted such "passive" investors to have discussions with issuers on certain corporate governance topics while maintaining their ability to report on Schedule 13G. However, under the new C&DIs, "[a] shareholder who goes beyond such a discussion . . . and exerts pressure on management to implement specific measures or changes to a policy may be 'influencing' control over the issuer."

In particular, recommendations by investors that explicitly or implicitly condition support for one or more of an issuer's director nominees on the issuer effecting certain changes (i.e., adopting an investor's recommendation(s)) may amount to "'influencing' control over the issuer" and thus require the investor to file a Schedule 13D and provide more burdensome and onerous disclosures.

However, as noted in the SEC's new guidance, determinations about whether Schedule 13G is available to an investor are "based on all the relevant facts and circumstances" concerning both the subject matter and the context of the engagement with the issuer's management.

As a result of this new guidance, current Schedule 13G filers may begin to approach issuers with a higher degree of caution or seek to limit engagement altogether for fear of being subject to the more onerous Schedule 13D disclosure requirements. This in turn could limit the amount and variety of valuable shareholder input an issuer receives ahead of its shareholder meetings. Further, issuers may be compelled to focus their engagement efforts more directly on investors below the 5% reporting threshold, who are not subject to reporting on Schedule 13D or Schedule 13G.

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: No. 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 report on Schedule 13G 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 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. 11, 2025]

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]