



SEC Issues New Guidance on Eligibility to File Schedule 13Gs

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On February 11, 2025, the staff (the Staff) of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (the SEC) issued updated and new Compliance and Disclosure Interpretations (C&) related to Schedules 13D and 13G under the Securities Exchange Act of 1934 (the Exchange Act). These C& address how to determine whether a shareholder acquired securities with the purpose or effect of changing or influencing control of the issuer. This determination affects whether the shareholder is eligible to file on short-form Schedule 13G instead of Schedule 13D.

C&DI 103.11 states that a shareholder's inability to rely on the exemption from the notice and waiting period under the Hart-Scott- Act (Act) for that had "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer" does not preclude a shareholder from filing on Schedule 13G. Eligibility to file on Schedule 13G is based upon whether the shareholder acquired or is holding the securities with the "purpose or effect of changing or influencing control of the issuer." The revisions to this C&DI clarify that the eligibility determination will be informed by the meaning of "control" as defined in Exchange Act Rule 12b-2.

New C&DI 103.12 (reproduced in full below) describes circumstances where a shareholder's engagement with an issuer on a particular topic would cause the shareholder to hold the securities with the "purpose or effect of changing or influencing control of the issuer" and, therefore, lose its eligibility to report on Schedule 13G.

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.

The new guidance may trigger a shift in the relationship between significant shareholders and issuers. A shareholder that wishes to continue to file on Schedule 13G will need to toe the line between engaging with an issuer about how the shareholder's views affect its voting decision and applying "pressure" on the issuer's management to implement a specific measure. This line is a blurry one, and some institutional investor practices that have been routine in the past may no longer be acceptable for Schedule 13G filers under the new guidance. Since the new guidance was released, institutional investors have suspended meetings with issuers in order to evaluate their shareholder engagement and voting policies that withhold support for incumbent directors at companies with policies inconsistent with their own.

Schedule 13G shareholders that engage with issuers should consider the new guidance in determining whether engagement tactics historically perceived as ordinary course may now cause the shareholder to no longer be eligible to file on Schedule 13G.

For more information or if you have any questions, please contact the authors of this blog post or your regular Winston contacts.

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