

MEMO# 36021

February 12, 2025

SEC Staff Issues Guidance on How Beneficial Owners' Engagement and Proxy Voting Activity Could Affect Their Section 13(d) and (g) Exchange Act Filing Obligations

[36021]February 12, 2025TO:ICI MembersSUBJECTS:Compliance
ESG

Investment AdvisersRE:SEC Staff Issues Guidance on How Beneficial Owners' Engagement and Proxy Voting Activity Could Affect Their Section 13(d) and (g) Exchange Act Filing Obligations

The SEC's Division of Corporation Finance released new guidance on Exchange Act Section 13(d) and (g) beneficial ownership reporting earlier this week.[\[1\]](#) The guidance specifically addresses how a large shareholder's engagement and proxy voting activity could affect its ability to file beneficial ownership reports with the SEC using the less onerous Schedule 13G.

Background

Securities law reporting requirements apply to holders that acquire a significant position in an issuer. Section 13(d) of the Exchange Act requires any person who, after acquiring directly or indirectly the beneficial ownership of an equity security registered under the Exchange Act, is the "beneficial owner" of more than five percent of such class of securities, to file with the SEC certain information on Schedule 13D.

Section 13(g), however, permits certain investors to file the less onerous Schedule 13G, *provided that* the investor acquired the securities with no purpose or effect of changing or influencing the control of the issuer, and not in connection with or as a participant in any transaction having such purpose or effect.[\[2\]](#) The SEC and its staff have provided guidance on this determination in the past.[\[3\]](#)

When registered funds and their advisers acquire beneficial ownership of more than five percent of a covered class of equity securities, they typically do so in the ordinary course of business and with no purpose or effect of changing or influencing the control of the issuer. These regulated funds and advisers typically meet the definition of Qualified Institutional Investor (QII)[\[4\]](#) and are eligible to file on Schedule 13G.

However, Acting Chairman Uyeda previously has asked: "So can an asset manager's stewardship and engagement activities - with the implicit threat of voting against a director standing for re-election - be described as having the purpose or effect of changing or influencing control of the company? In my view, that is an open question."[\[5\]](#)

New Staff Guidance on Schedule 13G Filing Eligibility

The SEC staff has updated its C&DIs by modifying Question 103.11[\[6\]](#) and issuing new Question 103.12. Both are included below in their entirety.

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.[\[7\]](#) [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.

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Notes

[1] [Exchange Act Sections 13\(d\) and 13\(g\) and Regulation 13D-G Beneficial Ownership Reporting](#), SEC Division of Corporation Finance ("C&DIs").

[2] Exchange Act Rule 13d-1(b)(1) and (c).

[3] In addition to the C&DIs, see, e.g., [Amendments to Beneficial Ownership Reporting Requirements](#), SEC Release No. 34-39538 (Jan. 12, 1998).

[4] Qualified Institutional Investors include, among others, registered investment companies and registered investment advisers. See Exchange Act Rule 13d-1(b).

[5] See [Remarks at the 2022 Cato Summit on Financial Regulation](#), Commissioner Mark T. Uyeda (Nov. 17, 2022).

[6] A redline comparison to the prior version of Question 103.11 can be found [here](#).

[7] Exchange Act Rule 12b-2 defines "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

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