SEC POLICY SHIFT AND RECENT CORP FIN UPDATES–PART 1

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US Corporate Alert

By: Julie F. Rizzo

Since the beginning of the year, the US Securities and Exchange Commission's (SEC) Division of Corporation Finance staff (Corp Fin Staff) has issued several important statements and interpretations, including a Staff Legal Bulletin on shareholder proposals and multiple new and revised Compliance and Disclosure Interpretations (C&DIs). Given the pace and importance of these recent changes, it is critical that public companies be aware of the significant policy shift at the Division of Corporation Finance and the substance of the updated statements and interpretations.

This is the first part of an ongoing series that will discuss recent guidance and announcements from the Corp Fin Staff. This alert will review the new and revised C&DIs released by the Corp Fin Staff relating to Regulation 13D-G, proxy rules, and tender offer rules.

REGULATION 13D-G

On 11 February 2025, the Corp Fin Staff revised one C&DI and issued a new C&DI with respect to beneficial ownership reporting obligations. Revised Question 103.11 clarifies that determining eligibility for Schedule 13G reporting (as opposed to Schedule 13D reporting) pursuant to Exchange Act Rule 13d-1(b) or 13d-1(c) will be informed by all relevant facts and circumstances and by how “control” is defined in Exchange Act Rule 12b-2. This revised C&DI removed the examples previously given as to when filing on Schedule 13D or Schedule 13G would be appropriate.

New Question 103.12 states that a shareholder's level of engagement with a public company could be dispositive in determining “control” and disqualifying a shareholder from filing on Schedule 13G. This new C&DI notes that when the engagement goes beyond a shareholder informing management of its views and the shareholder actually applies pressure to implement a policy change or specific measure, the engagement can be seen as “influencing” control over a company. Together, these revised and new C&DIs present a significant change in beneficial ownership considerations with respect to shareholder engagements.

Since the issuance and revision of these two C&DIs, the Corp Fin Staff has further indicated that the publishing of a voting policy or guideline alone would generally not be viewed as influencing control. However, if a shareholder discusses a voting policy or guideline when engaging with a company and the discussion goes into specifics or becomes a negotiation, it could be seen as influencing control. Additionally, the Corp Fin Staff explained that, while statements made by a shareholder during an engagement may indicate that it is not seeking to influence control, a shareholder's actions may still be considered an attempt to do so.

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For companies that actively engage with shareholders that report ownership of the company's holdings pursuant to a Schedule 13G, the new and revised Regulation 13D-G C&DIs may have the unintended effect of causing additional time and resources to be spent engaging with a broader pool of investors if engagements with larger shareholders are canceled, postponed, or lessened in scope.

PROXY RULES AND SCHEDULES 14A/14C

Over the past several proxy seasons, there has been an increase in the number of voluntary Notice of Exempt Solicitation filings by shareholder proponents and other parties in what is often seen as an inexpensive way to express support for a shareholder proposal or to express a shareholder's views on a particular topic. This can be seen as contrary to the intended purpose of a Notice of Exempt Solicitation filing, which was to make all shareholders aware of a solicitation by a large shareholder to a smaller number of shareholders. Many companies that had these voluntary Notice of Exempt Solicitation filings made in connection with a shareholder proposal have found them to be confusing to shareholders since there was limited information required by these filings and there was uncertainty about how to respond to materially false and misleading statements in them.

On 27 January 2025, the Corp Fin Staff revised two C&DIs and issued three new C&DIs relating to voluntary Notice of Exempt Solicitation filings. The new and revised C&DIs clarify that voluntary submissions are allowed by a soliciting person that does not beneficially own more than US$5 million of the class of subject securities, so long as the cover page to the filing clearly indicates this fact. Additionally, the notice itself cannot be used as a means of solicitation but instead should be a notification to the public that the written material has been provided to shareholders by other means. The Corp Fin Staff also confirmed that the prohibition on materially false or misleading statements contained in Exchange Act Rule 14a-9 applies to all written soliciting materials, including those filed pursuant to a Notice of Exempt Solicitation.

For companies that have had voluntary Notice of Exempt Solicitation filings made to generate publicity for a shareholder proposal or express a view on a particular topic, the new and revised Proxy Rules and Schedules 14A/14C C&DIs are intended to significantly limit the number of or stop these voluntary filings, which are simply made for publicity or to express a viewpoint.

TENDER OFFER RULES

On 6 March 2025, the Corp Fin Staff added five new C&DIs relating to material changes to tender offers after publication. According to Exchange Act Rule 14d-4(d), when there is a material change in the information that has been published, sent, or given to shareholders, notice of that material change must be promptly disseminated in a manner reasonably designed to inform shareholders of the change. The rule goes on to say that an offer should remain open for five days following a material change when the change deals with anything other than price or share levels.

In new C&DI Question 101.17, the Corp Fin Staff clarified that while the SEC has previously stated that an all-cash tender offer should remain open for a minimum of five business days from the date a material change is first disclosed, it understands this may not always be practicable. The Corp Fin Staff believes that a shorter time period may be acceptable if the disclosure and dissemination of the material change provides sufficient time for

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shareholders to consider this information and factor it into their decision regarding the shares subject to the tender offer.

New C&DIs 101.18–101.21 address material changes related to the status or source of the financing of a tender offer. In Question 101.18, the Corp Fin Staff indicated that a change in financing of a tender offer from "partially financed" or "unfinanced" to "fully financed" constitutes a material change that requires shareholder notice and time for consideration on whether a shareholder will participate. In Question 101.20, however, the Corp Fin Staff clarifies that the mere substitution of the source of financing is not material. The Corp Fin Staff did note that an offeror should consider whether it needs to amend the tender offer materials to reflect the material terms and the substitution of the funding source. While this may seem contrary to the Corp Fin Staff's guidance in this C&DI, an immaterial change in the funding source could trigger an obligation to amend the tender offer materials to reflect other changes, such as the material terms of the new source of funding.

In Question 101.19, the Corp Fin Staff indicated that a tender offer with a binding commitment letter from a lender would constitute a fully financed offer, while a "highly confident" letter would not. The answer to Question 101.21 builds on the guidance from the previous three new C&DIs to establish that when an offeror has conditioned its purchase of the tendered securities on the receipt of actual funds from a lender, a material change occurs when the lender does not fulfill its contractual obligation and the offeror waives it without an alternative source of funding.

In light of these new C&DIs, companies planning tender offers should play close attention to the status of any necessary funding, as changes in unfunded, partially funded, or fully funded financing can trigger the need to disclose a material change to stakeholders as well as to amend the tender offer materials.

CONCLUSION

This publication is the first in a series that seeks to highlight these policy changes and help public companies stay up to date on the Corp Fin Staff's guidance. Our Capital Markets practice group lawyers are happy to discuss how these policy and guidance changes can impact companies as they consider how to address the new and revised Regulation 13D-G, proxy rules, and tender offer rules C&DIs.

KEY CONTACTS



JULIE F. RIZZO
PARTNER

RALEIGH
+1.919.743.7336
JULIE.RIZZO@KLGATES.COM

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