

Breaking Down The SEC's New Proxy Interpretations

By **Laura Richman, Michael Hermsen and David Schuette** (May 17, 2018, 12:59 PM EDT)

On May 11, 2018, the staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission issued compliance and disclosure interpretations on proxy rules and related Schedules 14A and 14C. These C&DIs replace the interpretations published in the Proxy Rules and Schedule 14A Manual of Publicly Available Telephone Interpretations and the March 1999 Supplement to the Manual of Publicly Available Telephone Interpretations. Generally, the new C&DIs are consistent with the Telephone Interpretations, although several reflect substantive or technical changes from the Telephone Interpretations.

C&DIs With Substantive Changes

The following C&DIs reflect substantive changes from the corresponding interpretations provided in the Telephone Interpretations.

Cumulative Voting. C&DI 124.01 provides that if there is an election of directors for which the persons solicited have cumulative voting rights and state law grants authority to the proxy holder to exercise discretion to cumulate votes and does not require separate security holder approval with respect to cumulative voting, the soliciting party may cumulate votes among director nominees by simply indicating this in bold-faced type on the proxy card.

Non-Rule 14a-8 Matters. According to C&DI 124.07, if a company receives adequate advance notice of a non-Rule 14a-8 matter that may be raised at a meeting, it must file proxy materials in preliminary form if it cannot properly exercise discretionary authority on the matter in accordance with Rule 14a-4(c)(2).

Name Change. C&DI 126.02 states that a change in a company's name, by itself, does not require the company to file preliminary proxy materials.

Additional Common Stock. Note A to Schedule 14A provides:

[W]here solicitation of security holders is for the purpose of approving the authorization of additional securities which are to be used to acquire another specified company, and the registrants' security holders will not have a separate



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opportunity to vote upon the transaction, the solicitation to authorize the securities is also a solicitation with respect to the acquisition. Under those facts, information required by Items 11, 13 and 14 shall be furnished.

According to C&DI 151.01, when a company has alternative means of fully financing a contemplated acquisition, note A does not apply to a proposal for shareholders to approve additional shares of common stock for issuance in a public offering even though the proceeds could be used as consideration for the acquisition. However, if the cash proceeds from the public offering are expected to be used to pay any material portion of the consideration for the acquisition, then note A would apply.

New Plan Benefits Table. C&DI 161.03 specifies that if a company is required to include a new plan benefits table in a proxy statement, the table must list all of the individuals and groups for which award and benefit information is required, even if the amount to be reported is "0." This C&DI makes clear that this disclosure could also be provided narratively.

Elimination of Preemptive Rights. C&DI 163.01 treats elimination of preemptive rights as a modification of a security for the purposes of item 12 of Schedule 14A. Accordingly, a proxy statement seeking security holder approval for the elimination of preemptive rights from a security must contain the financial and other information to the extent required by item 13 of Schedule 14A.

C&DIs With Technical Changes

Technical changes are contained in:

- C&DI 126.04, addressing the need to deliver proxy cards in the Form S-4 context only with a definitive proxy statement after the Form S-4 has been declared effective by the SEC staff;
- C&DI 126.05, addressing the need to file written communications as additional soliciting material under Rule 14a-6(b) in the Form S-4 context;
- C&DI 158.01, addressing the need to disclose information required by items 7 and 8 (director and executive officer compensation and other information) with respect to directors not up for election in connection with proxy statements for a special meeting to elect a new director; and
- C&DI 158.03, addressing the need to disclose information required by items 7 and 8 (director and executive officer compensation and other information) in proxy statements in the Form S-4 context with respect to directors of the target company who will be appointed to the board of the acquiring company without shareholder approval when only the target company shareholders must vote on the transaction.

Practical Considerations

The new C&DIs provide interpretations on a broad range of proxy topics. Even though a great deal of the guidance has not changed from the Telephone Interpretations, the publication of the C&DIs as a consolidated document serves as a reminder that the SEC staff has a publicly available resource answering many questions relating to proxy regulation and disclosure. The staff also noted that it was in the process of updating other previously published interpretations relating to proxy rules, and we can expect to see additional C&DIs being added to this set of C&DIs in the future. Therefore, it will be important to continue to monitor these C&DIs for any additions to or changes from the existing interpretations.

The consolidation of the Telephone Interpretations into a single set of C&DIs makes it easier to locate the interpretations of the proxy rules and Schedules 14A and 14C. However, the staff noted in the introduction to the new proxy rules and Schedules 14A/14C C&DIs that, in addition to making the substantive and technical changes discussed above, they made nonsubstantive changes to other C&DIs posted on May 11, 2018. As a result, it is important to not simply rely on the replaced Telephone Interpretations but rather to read any applicable interpretation in the new C&DI format to determine whether it has any impact on the situation being analyzed.

Certain of the C&DIs have relevance in the mergers and acquisition context, with both a substantive change and some technical changes having applicability to proxy statements in that area. It will be important to review the new C&DIs to determine their applicability when working on a Form S-4 or a merger proxy statement.

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