

Division of Corporate Finance Releases Updated C&DIs

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On May 11, 2018, the Securities and Exchange Commission's Division of Corporate Finance (the "Division") released new [Compliance and Disclosure Interpretations \("C&DIs"\)](#) comprising the Division's new interpretations of the proxy rules and Schedules 14A and 14C. The new C&DIs replace interpretations previously published in the Division's [Proxy Rules and Schedule 14A Manual of Publicly Available Telephone Interpretations](#) and the Division's March 1999 Supplement to the [Manual of Publicly Available Telephone Interpretations](#) ("Telephone Interpretations").

Of interest for equity compensation matters is C&DI 161.03, which clarifies disclosure obligations in the New Plan Benefits Table that is required in a proxy statement pursuant to Item 10(a)(2) of Schedule 14A when shareholders are being asked to approve the adoption or material amendment of an equity plan. Previously, telephone interpretation guidance provided that when the New Plan Benefits Table is required in a proxy statement, even if an amount of "0" will be entered in the table, all of the individuals and groups for which award or benefit information is required should be listed in the table. New C&DI 161.03 updates this guidance in providing an alternative method of satisfying the Item 10(a)(2) requirement for individuals and groups for which award and benefit information to be reported is "0" through a narrative disclosure accompanying the New Plan Benefits Table, rather than in the New Plan Benefits Table itself. While such individuals and groups must still be reported, this C&DI provides some flexibility in the manner of reporting.

The Division noted that some of the new C&DIs reflect "substantive" changes to the previously available Telephone Interpretations, some reflect "technical revisions," and the remaining reflect only non-substantive changes. The following table includes each of the new C&DIs identified by the Division as containing substantive or technical changes, together with the previously available Telephone Interpretation guidance that has now been superseded.

Substantive Changes

Prior Telephone Interpretation

Cumulative voting rights disclosure

Rule 14a-4

The authority to cumulate votes among directors, in the discretion of the proxy, need not face type on the proxy card itself pursuant to Rule 14a-4(b)(1). There should, however, be disclosure of cumulative voting in the proxy statement.

Preliminary proxy materials for shareholder submissions

7S. Rule 14a-4(c)(1), (c)(2)

(a) If a company receives timely and complete notice of a matter submitted by a shareholder with Rule 14a-4(c)(2)(i), the company does not have discretionary voting authority on the matter. If the company wants to vote its proxies on the matter at the annual meeting, it must include the matter on its proxy card and provide in its proxy statement the necessary disclosure, including, inter alia, how and why the company intends to vote on the matter. In this circumstance, the company must file the discussion in Section IV(D) of Release No. 34-40018 (May 21, 1998) on filing proxy statements with its preliminary form. The benefits of that interpretive position are available only when a company does not exercise discretionary voting authority on a non Rule 14a-8 matter... Here, because the company received timely and complete notice, thereby precluding it from exercising discretionary voting authority, the company cannot file a plain-vanilla proxy statement under Rule 14a-6.

(b) If the notice is timely but deficient (i.e., does not comply with the requirements listed in Section IV(D) of Release No. 34-40018, for example, failing to indicate that the proponent intends to deliver a proxy statement at the meeting or that a majority of holders of at least that percentage of the company's voting shares necessary to approve the matter), the company would not be required to put the matter on its proxy card. However, the company cannot exercise discretionary authority is conditioned on including in its proxy statement advice on how to vote on the matter and how the company intends to exercise its discretion to vote on that matter. The company may still file a plain-vanilla proxy statement pursuant to Rule 14a-6 will depend upon, among other things, the extent of its comments on, or discussion in, its proxy material of any solicitation in opposition to the matter at the meeting. [Superseded]

Preliminary proxy statements for corporate name changes

Rule 14a-6(a)

The caller raised the question whether a preliminary proxy statement need be filed in connection with a proposed corporate name change to be submitted for shareholder approval at the issuer's annual meeting along with a shareholder proposal and the election of directors. While the latter two items are excluded under five Rule 14a-6(a) exclusions from the preliminary proxy filing requirement, a change in the name of the issuer to delete the surname of a long-dead founder that bore no relation to a change in the present composition of the board of directors would not appear to qualify for exclusion under the literal reading of the rule.

As set forth in Exchange Act Rel. No. 25217 (Dec. 21, 1987), the underlying purpose of the rule is to relieve registrants and the Commission of unnecessary administrative burdens and procedures associated with the filing and the processing of proxy material that is currently subject to separate preliminary forms. Consistent with this purpose and the reason for the name change proposal, the staff advised the requestor that a preliminary proxy filing relating to the planned name change is not required.

Information required pursuant to Note A of Schedule 14A

9S. Schedule 14A, Note A

Note A to Schedule 14A requires that information called for by Items 11, 13 and 14 be provided if the company's shareholders are asked to authorize the issuance of additional securities to be used to acquire another company when there will be no separate opportunity to vote on the acquisition. This would be the case if the securities will be sold in a public offering for cash to finance the transaction. [S]

New Plan Benefits Table

Schedule 14A, Item 10(a)(2)

If the New Plan Benefits Table is required, all of the individuals and groups for which award information is required should be listed (including those for which the amount to be reported

Elimination of preemptive rights

** Schedule 14A **

A proxy statement requesting shareholder approval of the elimination of preemptive right modification of a security for purposes of Item 12 of Schedule 14A (and may be tantamount to new security, depending on the facts and circumstances, thereby raising an issue regarding registration absent an exemption). Thus, the financial statement requirements of Item 13

Technical Revisions

Prior Telephone Interpretation

Proxy card circulation in connection with Form S-4

** Rule 14a-6; Form S-4 **

A registrant can use its S-4 proxy statement/prospectus as a red herring. Since 1992, registrants have been able to solicit immediately upon filing of a preliminary proxy statement (absent confidential treatment under Rule 14a-6(e)(2)) rather than waiting 10 days pursuant to Rule 14a-6(c) so long as the proxy card (whether in preliminary or definitive form) is not circulated. Because the transaction described would amount to an investment decision with respect to the issuer, if the issuer is not being registered, no proxy card could be sent until after the registration statement became effective and the final prospectus was furnished.

Filing of additional communications

** Rule 14a-6; Form S-4 **

An issuer filed a registration statement on Form S-4 that contained its proxy material. After the effective date of the registration statement, the issuer decided to mail an additional letter to its shareholders in connection with the transaction. This letter is filed as additional soliciting material pursuant to Rule 14a-6 upon first use.

Disclosure requirements in connection with director elections

Schedule 14A

An issuer recently solicited proxies for the election of 15 directors. In about three months, hopes to acquire another company, and will hold a special meeting to elect one of the offi newly acquired company as a sixteenth director. The issuer asked whether the proxy mat special meeting would have to include the information required by Items 6 and 7 of Schec the 15 recently elected directors. The issuer was informed that Schedule 14A would requi information to be included in the proxy statement.

Director disclosure in connection with merger

Schedule 14A, Note A

B is to be merged into A in a Rule 145 transaction. B's shareholders will be voting to appr transaction and will become shareholders of A. A's shareholders are not voting on the pro transaction. Three of B's directors will become directors of A. Pursuant to Note A to Sched Form S-4 should contain the information required by Items 6 and 7 of Schedule 14A as to directors.

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