

SEC/CORPORATE

SEC Division of Corporation Finance Issues C&DIs on Proxy Rules and Proxy Statements, Overhauling Telephone Interpretations Manual

On May 11, the staff of the Division of Corporation Finance of the Securities and Exchange Commission (the Staff) issued 45 Compliance and Disclosure Interpretations (C&DIs) that relate to the proxy rules and proxy statements, replacing the Staff's prior interpretations that were published in the Proxy Rules and Schedule 14A Manual of Publicly Available Telephone Interpretations (the Manual) and the March 1999 Supplement to the Manual (the Supplement). Thirty-five of the C&DIs reiterate prior guidance from the Manual and the Supplement. This article highlights the six C&DIs that reflect substantive changes and the four C&DIs that reflect technical changes to the prior guidance in the Manual and the Supplement. The Staff also noted that it is in the process of updating other previously published interpretations relating to the proxy rules.

C&DIs With Substantive Changes

C&DI 124.01

In C&DI 124.01, the Staff provides guidance that a soliciting party may cumulate votes among director nominees by simply indicating that in bold-faced type on the proxy card, as long as applicable state law grants a proxy holder the authority to exercise discretion to cumulate votes and does not require separate approval with respect to cumulative voting. The Staff eliminated the prior guidance from the Manual to the effect that discretionary authority to cumulate votes among directors in an election could be exercised, without indicating such authority in bold-face type on the proxy card, if appropriate disclosure of cumulative voting was included in the proxy statement.

C&DI 124.07

According to C&DI 124.07, if a company receives adequate advance notification of a proposal submitted by a shareholder for consideration at a meeting that is not intended to be included in the company's proxy statement (a non-Rule 14a-8 proposal), the company must file proxy materials in preliminary form if the company cannot properly exercise discretionary authority on the matter in accordance with Rule 14a-4(c)(2).

C&DI 126.02

In C&DI 126.02, the Staff provides guidance that a company is not required to file a preliminary proxy statement in connection with a proposed change in its corporate name, consistent with Release No. 25217 of the Securities Exchange Act of 1934. Exclusions under Rule 14a-6(a) from the requirement to file a preliminary proxy that are intended to "relieve registrants and the Commission of unnecessary administrative burdens and preparation and processing costs associated with the filing and processing of proxy material that is currently subject to selective review procedures but ordinarily is not selected for review in preliminary form."

C&DI 151.01

Note A to Schedule 14A requires that information called for by Items 11 (Authorization or issuance of securities otherwise than for exchange), 13 (Financial and other information) and 14 (Mergers, consolidations, acquisitions and similar matters) be provided in a proxy statement when security holders are asked to approve the

authorization of additional securities to be used to acquire a specified company when there is no separate opportunity to vote on the acquisition itself. The Manual clarified that a company would be required to include such information in its proxy statement even when the securities will be sold in a public offering for cash to finance the transaction. In C&DI 151.01, the Staff provides that the information called for by Items 11, 13 and 14 need not be included in a proxy statement under this scenario if the company has alternative means for fully financing the acquisition because raising proceeds through the sale of common stock is not an integral part of the acquisition transaction. However, if the company plans to use cash proceeds from the public offering to pay any material portion of the consideration for the acquisition, then the instructions in Note A to Schedule 14A would apply.

C&DI 161.03

The Staff provided guidance in the Manual that, if a company is required to include the New Plan Benefits Table in its proxy statement, it must list all of the individuals and groups for which award or benefit information is required, even if the reported amount is “0.” C&DI 161.03 reiterates the guidance from the Manual but also provides that, instead of listing such individuals and groups for which the amount reported is “0” in the New Benefits Table, a company may instead provide narrative disclosure identifying any such individual or group to accompany the table.

C&DI 163.01

The Manual contained guidance that the financial and other information contemplated by Item 13 of Schedule 14A would need to be included in a proxy statement requesting shareholder approval of the elimination of preemptive rights because such a proposal involves the modification of a security for purposes of Item 12 of Schedule 14A. C&DI 163.01 reiterates the guidance from the Manual and clarifies that the financial and other information would need to be included in such a proxy statement *to the extent* required by Item 13 of Schedule 14A. Pursuant to Item 13 of Schedule 14A, certain information otherwise required may be omitted if it is not material in the context of the matter to be voted upon.

C&DIs With Technical Changes

C&DI 126.04

C&DI 126.04 clarifies that a registrant that files a Form S-4, including a preliminary proxy statement/prospectus, may not send proxy cards to security holders until the Form S-4 is declared effective and the final prospectus is furnished to security holders.

C&DI 126.05

C&DI 126.05 clarifies that a registrant that files a registration statement on Form S-4 that contains proxy statement disclosure and, after the effective date of that registration statement, sends additional communication to security holders relating to the transaction must file the communication as other soliciting material pursuant to Rule 14a-6(b) (and not under Rule 14a-12) of the Securities Exchange Act of 1934 no later than the date it is first sent or given to security holders.

C&DI 158.01

C&DI 158.01 clarifies that a company is required to disclose information in a proxy statement under Items 7 and 8 (director and executive officer compensation and related information) of Schedule 14A with respect to directors not standing for election for a special meeting to elect a new director.

C&DI 158.03

Similar to C&DI 158.01, C&DI 158.03 provides that an acquiring company is required to disclose information in its registration statement on Form S-4, including the target company’s proxy statement, under Items 7 and 8 (director and executive officer compensation and related information) of Schedule 14A with respect to directors of the acquiring company who will remain on its board, in addition to the target company directors who will be joining the acquiring company’s board, even when only the shareholders of the target company are required to approve the transaction.

The complete text of the new C&DIs is available [here](#).

DERIVATIVES

See “CFTC Grants Relief to Certain Non-US Persons in Determining Swap Dealer and Major Swap Participant Status” in the CFTC section.

CFTC

CFTC Grants Relief to Certain Non-US Persons in Determining Swap Dealer and Major Swap Participant Status

On May 16, the Commodity Futures Trading Commission’s Division of Swap Dealer and Intermediary Oversight (DSIO) provided no-action relief for certain non-US persons from counting swaps with international financial institutions, such as the International Monetary Fund, that are incorporated or based in the United States in determining swap dealer and major swap participant status as specified by the CFTC’s definitions.

The *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, issued by the CFTC in 2013, generally requires a non-US person to count swap activity with US person counterparties in determining whether it meets the criteria for swap dealer or major swap participant registration. To the extent an international financial institution is incorporated in the United States, or has its principal place of business in the United States, it could be deemed a US person with respect to the above-mentioned guidance. However, DSIO’s position in the no-action letter indicates that it would not recommend enforcement action against a non-US person that is neither a guaranteed affiliate nor a conduit affiliate of a US person if it excludes swaps entered into with international financial institution counterparties in determining whether it is a swap dealer or a major swap participant. The rationale for relief expressed in the no-action letter also would logically support relief for US persons from having to count swaps with international financial institutions, but the letter does not address that situation.

The no-action letter is available [here](#).

CFTC Opens Access to Indian Futures Market for US Customers

On May 17, the Commodity Futures Trading Commission issued an order to the National Stock Exchange of India (NSE) through its Part 30 exemptive program, which affords regulatory deference to foreign regulatory frameworks and provides US customers greater access to certain foreign futures markets. The order allows NSE’s members to directly accept US customer funds to trade in futures and options contracts on NSE without such members being required to register as futures commission merchants with the CFTC, based on substituted compliance with applicable Indian law and the rules of the NSE. The relief is based upon a determination by the CFTC that the local laws and regulations in India relevant to NSE members establish a regulatory framework that is generally comparable to that imposed under the Commodity Exchange Act and CFTC regulations for transactions on US markets. In the event of any material changes to its local laws and regulations, NSE is required to promptly notify the CFTC.

The order will be published in the *Federal Register* and the relief is effective with respect to each foreign firm upon its filing of certain representations with the National Futures Association (NFA). The CFTC release, together with a link to the order, is available [here](#).

BREXIT/EU DEVELOPMENTS

Legal Entity Identifier Regulatory Oversight Committee Issues Second Progress Report

On May 2, the Legal Entity Identifier Regulatory Oversight Committee (LEI ROC) published its second progress report, which included an overview of the Global Legal Entity Identifier System (GLEIS), regulatory uses of the LEI and LEI ROC’s activities. The LEI ROC’s first progress report was published on November 5, 2015.

The report highlights that the number of LEIs in issuance increased rapidly in the second half of 2017, as a result of new regulatory requirements (including the Revised Markets in Financial Instruments Directive (MiFID II)), and the total issued now exceeds 1 million. Based on European Central Bank data, LEIs cover securities with a total value of EUR 95 trillion worldwide, as of November 2017.

The report also notes that regulatory authorities in jurisdictions represented on the LEI ROC have adopted at least 91 regulatory uses of the LEI, ranging from the optional use of an LEI to mandatory use. In Europe, MiFID II states that investment firms are unable to provide certain services to clients that do not have an LEI.

The LEI ROC proposed further potential uses of LEIs in the report that could result in benefits for both regulators and industry participants, such as using the LEI as a tool to support the use of more granular data, to assist in the prevention of money laundering and terrorist financing, and to implement sanction regimes.

The report is available [here](#); and the LEI ROC's first progress report is available [here](#).

ECB Publishes Article on Impact of Brexit Transition Period

On May 16, the European Central Bank (ECB) published an article on the impact of a potential Brexit transition period (for more information on the proposed transition period, please see the [Corporate & Financial Weekly Digest](#) edition of March 23, 2018).

In the article, the ECB sets out how the transition period affects its expectations of banks' preparations for Brexit:

- The ECB expects banks to continue to prepare for all possible eventualities. It notes the uncertainty caused by the fact that the precise content of the UK-EU withdrawal agreement will not be known until late 2018, as well as the risk of there being no transition period if such agreement is not ratified by all parties.
- Banks that are planning to relocate activities from the UK to the euro area must submit their authorization applications as soon as possible. The ECB and national supervisors expect to receive any such applications by the end of the second quarter of 2018 at the latest. The ECB states that banks should use the transition period to implement their Brexit plans and to adapt their operations to the impact of the UK becoming a third country, rather than using the transition period as a reason to delay Brexit planning.
- The ECB is prepared to provide flexibility to enable banks to meet certain supervisory expectations and build up their capabilities in the EU. During this "build-up period," the ECB and national supervisors may allow more time for banks on a case-by-case basis to meet expectations regarding their local risk management capabilities and governance structures and to move to an adequate and balanced business organization within the EU. The ECB and national supervisors will take decisions on a flexible approach to individual banks based on detailed and reasonable business plans for all EU operations and a clear understanding of banks' long-term target operating models.

The ECB's article is available [here](#).

Council of EU Adopts MLD5

On May 14, the Council of the EU published a press release announcing that it has adopted the proposed Fifth Money Laundering Directive (MLD5). The introduction of MLD5 forms part of the European Commission's action plan to counter terrorist financing and money laundering, published in February 2016 (further details are available in the [Corporate & Financial Weekly Digest](#) edition of February 12, 2016).

The press release states that the proposed Directive was adopted at a meeting of the Council, in its configuration as the General Affairs Council, without discussion.

The European Parliament adopted MLD5 on April 19, (for more information please see the [Corporate & Financial Weekly Digest](#) edition of April 20, 2018). The text adopted by the Council is in the same form as that adopted by the European Parliament, except for certain minor drafting changes. The next step is for the legislative act to be published in the *Official Journal of the EU*.

The Council of the EU's press release is available [here](#).

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