POLICY BRIEFING: SCHEDULE 13(D) AND 13(G) REPORTING

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RESOURCES

1. Code of Federal Regulations (CFR), Filing of Schedules 13(D) and 13(G)
2. Exchange Act Sections 13(D) and 13(G) and Regulation 13D-G Beneficial Ownership Reporting: Compliance and Disclosure Interpretation (February 11, 2025)
    - Refer to Question 103.11 and 103.12
3. Modernization of Beneficial Ownership Reporting (October 2023)
    - Refer to page 133 for Commission-level interpretation on group formation

For questions relating to this brief, contact Will Sullivan, Senior US Policy Analyst, William.Sullivan@unpri.org.

OVERVIEW

The purpose of this briefing is to provide a high-level overview of a specific regulatory provision of the US Securities and Exchange Commission (SEC) governing filings for those investors who hold 5% or more of any class of a company's outstanding stock.

On 11 February 2025, staff at the SEC released an amended Compliance and Disclosure Interpretation (C&DI) of existing regulation for such shareholders. The updated interpretation, known colloquially as "staff guidance," has sparked many questions among PRI signatories seeking to better understand the purpose and substance of this update.

The intended audience for this document is PRI signatories who are unfamiliar with the SEC's beneficial ownership regulations, and specifically those governing shareholders with significant holdings in individual companies (approaching the 5% threshold).

The statements in this briefing should be understood as generalized summaries, where idiosyncratic situations are not considered, and should not be relied upon by readers for decision-making of any kind. Further, the contents in this briefing do not represent legal advice. For any questions regarding the application of this interpretation change to your practices, readers should consult their legal counsel.

SCHEDULE 13(D) AND 13(G) FILINGS

Schedules 13(D) and 13(G) are two types of filings that the SEC requires investors or groups of investors to submit when they hold 5% or more of any class of a US company's outstanding stock. The intent of such rules is to provide market transparency as to who may be seeking to change or influence control of a publicly traded company.

These forms, and the rules surrounding these forms, are only applicable to those that meet the 5% ownership threshold.

An investor or a group of investors is required to file a Schedule 13(D) when they:

- own 5% or more of any class of a US company's outstanding stock and
- have an intent to change or influence control of the company.

An investor or a group of investors are required to file a Schedule 13(G) when they:

- own 5% or more of any class of a US company's outstanding stock and
- do not have an intent to change or influence control of the company.

As you can see in the above, the difference in the two filing requirements is in relation to intent to change or influence control of the company.

Schedule 13(D) is more onerous as it requires detailed disclosure to be filed with the SEC within five business days of reaching the five percent ownership threshold as well as regular updates. Schedule 13(G) is an abbreviated, short-form version of the filing with an extended filing deadline.

COMPLIANCE AND DISCLOSURE INTERPRETATION (C&DI)

A compliance and disclosure interpretation from the SEC reflects the views of the staff and is meant to clarify how staff are putting the current SEC rules into practice in their work. It is also known colloquially as "staff guidance" or "staff-level guidance". The terms are used interchangeably. Staff guidance does not reflect a change to SEC rules, nor does it go through any review and approval process by the five-member panel of Commissioners.

The February 2025 staff-level guidance includes updates to the interpretations of the activities that might exhibit an intent to change or influence control of a company, and therefore, result in an investor currently filing a Schedule 13(G) having to file a Schedule 13(D).

A specific example cited in the new guidance suggests an investor that owns 5% or more of any class of a US company's outstanding stock is thought to intend to change or influence control of a company when:

- they engage a company to change its governance structure, update its executive compensation practices, or undertakes specific action on an ESG policy, **and**
- "explicitly or implicitly" conditions its support of a director nominee on the company's adoption of the recommendation.

In other words, an investor that meets the ownership threshold will have to file a Schedule 13(D) if they use voting “against” or “withholding” a vote on management-nominated directors as leverage to persuade a company to change its governance, policies, or behavior.

Engagements relating to governance structures, executive compensation, or ESG policies alone, without indicia of attempting to change or influence control of the company, would likely allow an investor or a group of investors to file a Schedule 13(G).

The guidance also creates a distinction between the actions listed above and those that would inherently be considered “seeking to change or influence control”. These include engaging with the issuer’s management to call for:

- the sale of the issuer;
- the sale of a significant amount of the issuer’s assets;
- the restructuring of the issuer; or
- an election of director nominees other than the issuer’s nominees.

The guidance makes clear, however, that all determinations are made considering the facts and circumstances of the engagement.

GROUP FORMATION

The updated interpretation of Schedule 13(D) and 13(G) does not impact the Commission’s policies regarding when coordination among investors would be considered forming a group, and therefore require investors to aggregate the shareholdings of the group members, for the purposes of considering the 5% threshold.

In 2023, the SEC finalized a rulemaking “Modernization of Beneficial Ownership Reporting,” which included guidance on group formation voted on and approved by the five-member panel of Commissioners. Commission-level guidance supersedes guidance provided by staff and cannot be amended except by another Commission-level action[1].

The Commission-level guidance included in the 2023 rulemaking stated that the following activities when done in coordination with other investors would **not** be considered group formation:

- participation in a joint engagement strategy not related to director elections;
- discussions with management;
- joint submission of shareholder proposals; and
- communications between shareholders and investors seeking support for a proposal.

For more information on the standing SEC guidance on group formation, access “Modernization of Beneficial Ownership Reporting” pages 133 – 139.

[1] “Commission-level action” refers to any action taken by the five-member panel of Senate-confirmed Commissioners, not members of the SEC staff.

FREQUENTLY ASKED QUESTIONS

Q: Are there any circumstance where a shareholder or group of shareholders who do[es] **not** own 5% or more of any class of a US company's outstanding shares has to file a Schedule 13(D) or 13(G)?

A. No. These reports only pertain to those who own 5% or more of a US company's issued shares.

Q: Could the SEC lower the 5% threshold of beneficial ownership reporting?

A. The SEC could lower the threshold, but it would have to occur through the official rulemaking process. The Administrative Procedure Act (APA) governs the federal rulemaking process, including requiring notice and a public comment period for significant changes to existing rules.

Q: In 2023, the SEC voted to finalize its rulemaking, "Modernization of Beneficial Ownership Reporting", which clarified activities that would trigger group formation. Does the February 2025 staff guidance impact this 2023 rulemaking?

A. No. The Compliance and Disclosure Interpretation (C&DI) changes to Schedule 13(D) and 13(G) do not impact the 2023 rulemaking, including the guidance on group formation.

Q: The February 2025 guidance refers specifically to conditioning/withholding support for director elections. Could conditioning/withholding support for other types of resolutions, such as say-on-pay or shareholder proposals be in scope of this guidance?

A. The key factor is whether the shareholder is intending to change or influence control of the issuer. While some resolutions or proposals do not appear to intend to change or influence control of an issuer, it is largely a facts and circumstances determination. Legal counsel should consider all engagement or activities that a shareholder may be having with a US company of which they own 5% or more of any class of shares.

Q: How would the SEC determine intent in this case? Five-percent ownership is something you can measure, but how would you assess the intent of an individual or group?

A. This is a facts and circumstances determination. The SEC would likely review both public statements and, to the extent they could find, private statements that a shareholder has made related to the topics of the conversation. For this reason, shareholders should thoroughly document all engagements to avoid the potential of misconstrued intentions.

Q: How does this change in interpretation impact votes that are cast by proxy advisors or automated by proxy guidelines?

A. Schedule 13(G) eligibility is determined by a shareholder's intent to change or influence control of a US company of which they own 5% or more of issued shares. The existence of guidelines or a vote on an ESG-related shareholder proposal, without rationale tied to an action, would not amount to changing or influencing control. However, this determination will still rely on facts and circumstances.

Q: Would this change in interpretation impact those who are based abroad but invest in US entities?

A. Yes, this interpretation applies to any shareholder that owns 5% or more of the shares of any class issued by a US company. A foreign investor or group of investors, whether they are separately required to register with the SEC or not, would have to file a Schedule 13(D) or 13(G) within the time required, depending on whether they have an intent to change or influence control of the company.

Q: Does the 5% ownership threshold apply to American depositary receipts (ADRs)?

A. Yes, ADRs are counted toward the total holding of any class of underlying shares. As ADRs can be traded as fractional shares, they are counted as a percentage of the total registered class of securities of the issuer. If an investor owns 5% or more of a company's ADRs, they only have to file a Schedule 13(D) or 13(G) if those ADRs represent 5% or more of the total registered class of securities of the issuer.