BEYOND A MERE TECHNICALITY: IMPACT OF NEW SEC GUIDANCE REGARDING SCHEDULE 13G ELIGIBILITY

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Regulation by the U.S. Securities and Exchange Commission ("SEC") shapes interactions between shareholders and companies' management. One of the most influential tools at the SEC's disposal is its oversight of reports regarding ownership interests on Schedule 13D and 13G. Although institutional investors have traditionally relied on the streamlined Schedule 13G, the new guidance issued by the SEC makes it harder for investors to remain eligible for 13G filing. Expanding the scope of 13G-disqualifying actions, the new guidance has a tangible impact on all actors in the corporate sphere, including shareholders, Board directors and officers, proxy advisory firms, and activists. Advocates of the new guidance portray it as a common-sense interpretation of longstanding rules, while critics point to its inadvertent consequences such as the chilling of engagement and the rise in influence of proxy advisors. After conducting a multi-stakeholder-centric analysis of the new guidance, this piece will consider how the new guidance may result in underinvestments in engagement activities. The piece also puts the new guidance in the context of other SEC policy changes and takes a forward-looking approach, considering the adaptive mechanisms employed by capital markets participants.

Table of Contents

Introduction

The Securities Exchange Act of 1934 ("Exchange Act") requires shareholders who own more than 5% of a public company's stock to report their ownership on a complex Schedule 13D.[1] However, investors who do not hold their stake with the purpose or effect of changing or influencing a company's "control" are exempt from the requirement to file a Schedule 13D and can, instead, file a Schedule 13G.[2] While a mere technicality at first glance, the eligibility for Schedule 13G has important implications, especially for institutional investors.

Institutional investors, unlike retail ones, are professional managers who pool together capital and invest it on behalf of their clients.[3] The comprehensive and repeated disclosure requirements of Schedule 13D are ill-suited for institutional investors' strategy and business model.[4] First, because they hold significant positions in most public companies,[5] filing a Schedule 13D for each company is not practical for them.[6] The costs associated with such filings, in terms of human, time, and financial resources, are substantial.[7] Second, filing a Schedule 13D could pose reputational concerns for institutional investors especially the Big Three index fund managers (BlackRock, Vanguard, and State Street), who want to avoid being labeled as "activists" and maintain a good working relationship with companies' management.[8]

I. Tale of Two Guidances: Old vs. New Version

Schedule 13G is available to several categories of beneficial owners, including qualified institutional investors under Rule 13d-1(b) and passive investors under Rule 13d-1(c). Qualified institutional investors may use Schedule 13G if they acquired securities "in the ordinary course of [their] business and not with the purpose [or] effect of changing or influencing the control of the issuer."[9] Passive investors can also file under Schedule 13G if they own less than 20% of the class.[10] Both exemptions condition eligibility

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[1] 17 C.F.R. § 240.13d-1(a) (2025).

[2] 17 C.F.R. § 240.13d-1(b) (2025); 17 C.F.R. § 240.13d-1(c) (2025).

[3] *Institutional Investors and 'Smart Money'*, FINRA, Oct. 15, 2024, https://www.finra.org/investors/insights/institutional-investors-and-smart-money.

[4] *See, e.g.*, Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. Econ. Persp. 89, 103 (2017).

[5] *See* Lucian A. Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L.Rev. 721, 725-27 (2019) ("[I]nstitutional investors now control a large majority of the shares of public companies[.]").

[6] Stanford Law School, *Rock Shorts: New SEC 13G/13D Guidance & Shareholder Engagement w/ S. Mathew & C. Thomas (Kirkland)*, at 12:00 (YouTube, Apr. 8, 2025), https://www.youtube.com/watch?v=QrEVlWzWVBg.

[7] *Id.*

[8] Stanford Law School, *supra* note 6, at 13:30.

[9] 17 C.F.R. § 240.13d-1(b).

[10] 17 C.F.R. § 240.13d-1(c).

on the absence of a "control" purpose or effect. The SEC has been providing guidance on how to interpret this core requirement for Schedule 13G eligibility.

The prior SEC Compliance and Disclosure Interpretation ("C&DI") guidance, which had been in effect for almost a decade before the 2025 policy shift, created a safe harbor for engagement between shareholders and management on topics such as executive compensation, social or public interest issues, and corporate governance topics (e.g., removal of staggered boards, majority voting standards in director elections, and elimination of poison pill plans).[11] A shareholder could engage with the issuing company's management on these issues without endangering their eligibility for Schedule 13G as long as the discussion was "undertaken . . . as part of a broad effort to promote [the shareholder's] view of good corporate governance practices for all of its portfolio companies, rather than to facilitate a specific change in control in a particular company."[12] The old guidance contrasted such conversations with engagement on particular "control" transactions, such as the sale of the issuer, the sale of a significant amount of assets, a restructuring, or a contested election of directors.[13] These forms of engagement have always rendered a shareholder ineligible for Schedule 13G.[14]

On February 11, 2025, the SEC staff issued a new C&DI, which takes a different approach to defining "purpose or effect of changing or influencing control of the issuer."[15] Anchoring its view in the meaning of "control" as defined in Rule 12b-2 under the Exchange Act, the SEC now broadens the engagement types that count as attempts to "control" the issuing company.[16] Shareholders are not allowed to explicitly or implicitly condition their support of issuers' direct nominees on the issuers' adoption of their recommendations on executive compensation practices, social and environmental issues, or corporate governance topics.[17] Furthermore, shareholders who want to remain eligible for Schedule 13G cannot discuss with management their voting policies on particular topics and state, as a way of applying pressure on management, that they will vote against the issuer's director nominees unless management makes changes to align with the shareholder's preferences.[18]

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[11] SEC Compliance and Disclosure Interpretations: Regulation 13D-G Section 103, Question 103.11 (July 14, 2016), https://www.sec.gov/files/corpfin/13d-g-beneficial-ownership-reporting-103-11.pdf.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] SEC Compliance and Disclosure Interpretations: Regulation 13D-G Section 103, Question 103.12 (Feb. 11, 2025), https://www.sec.gov/about/divisions-offices/division-corporation-finance/exchange-act-sections-13d-13g-regulation-13d-g-beneficial-ownership-reporting-021125.

[16] *Id.*

[17] *Id.*

[18] *Id.*

II. Impact of New Guidance Across the Corporate Arena

The new guidance has become the focus of intense debates: the departure from the quite permissive language of the old guidance sparked concern among capital markets participants.[19] In fact, as soon as the new C&DI was announced, some institutional investors canceled their engagement meetings with U.S. issuers fearing that such meetings could render them ineligible for Schedule 13G.[20]

A. Institutional Investors

The effect of this new guidance is likely to be most salient for institutional investors. They are one of the main beneficiaries of the Schedule 13G option because they own more than 5% of many companies, yet do not engage in traditional activism (such as proxy fights).[21]

While institutional shareholders have occasionally leveraged their proxy voting power to influence governance practices, the new C&DI is likely to impact their willingness to engage in stewardship activities involving the topics covered by the guidance.[22] The Big Three index fund managers have special "stewardship teams" whose jobs entail engaging with management and directors in the context of annual meetings to discuss corporate governance and executive compensation issues.[23] While before, these stewardship teams could openly express their preference for governance reforms (such as removal of staggered boards), now they will probably stay away from such issues.

In addition to the changes in the substance of the engagements, the new guidance may drive institutional investors to alter their general approach to engagement. Institutional investors have already been reported to terminate proactive outreach to companies, instead meeting with them only upon

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[19] *See* Maia Gez et al., *"Under Pressure": Walking the Fine Line of Section 13(d) Passive Investor Status*, White & Case LLP (Mar. 11, 2025), https://www.whitecase.com/insight-alert/under-pressure-walking-fine-line-section-13d-passive-investor-status.

[20] *Id.*

[21] *See* Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs. Activist Wolf Packs*, 14 Ohio State Bus. L.J. 135, 138 (2020).

[22] *See* Scott A. Barshay et al., *Shifting Rules of Engagement: The Impact of Recent SEC Guidance on 13G Eligibility, Rule 14a-8 Shareholder Proposals and Exempt Solicitations*, Paul, Weiss LLP (Feb. 19, 2025), https://www.paulweiss.com/insights/client-memos/shifting-rules-of-engagement-the-impact-of-recent-sec-guidance-on-13g-eligibility-rule-14a-8-shareholder-proposals-and-exempt-solicitations; *see also* Katherine Terrell Frank et al., *SEC Issues New Staff Legal Bulletin on Shareholder Proposals and C&DI on Schedule 13G Eligibility*, Vinson & Elkins LLP (Feb. 13, 2025), https://www.velaw.com/insights/sec-issues-new-staff-legal-bulletin-on-shareholder-proposals-and-cdi-on-schedule-13g-eligibility/.

[23] *See* David A. Katz, Elina Tetelbaum & Loren Braswell, *The "Big Three" Shift Approach to Stewardship*, Wachtell, Lipton, Rosen & Katz LLP (Aug. 25, 2025), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.29829.25.pdf.

request.[24] Additionally, some investors have become more focused on listening rather than speaking themselves.[25] Therefore, in light of the new C&DI, engagement may become less of a dialogue.

Changes in timing may also follow. Because the C&DI describes influence and control especially in the context of director elections, investors may be more comfortable discussing with companies during the "off-season" as opposed to right before annual shareholder meetings.[26]

B. Company Management

Companies' management will also be impacted by the shift in institutional investors' approach to stewardship triggered by the new C&DI. Given institutional shareholders' increasing reluctance to reach out to management, companies are likely to struggle to understand the priorities of their shareholders.[27] Management and directors may be left in the dark and unable to identify (or preemptively address) the concerns of their largest investors. This tendency will result in more uncertainty regarding shareholders' votes, including unanticipated opposition to Board nominees and lower support than expected on issues such as say-on-pay.[28]

Furthermore, because institutional investors will likely take a more backseat approach to engagement, management will be incentivized to reach out to the shareholders directly. This pressure is likely to entail significant costs for companies. Relatedly, companies might need to incur costs to describe their policies and programs in their proxy statements in a comprehensive and persuasive manner, in order to reduce reliance on shareholder outreach during the proxy solicitation period.[29] Moreover, for critical issues, management may need to proactively reach out to their other shareholders, including retail investors and smaller institutional investors whose ownership is below 5%.[30]

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[24] *See* Merel Spierings, Christina Thomas & Shaun Mathew, *Shareholder Engagement Under the New 13G Regime: Key Takeaways From Recent Panel*, Harv. L. Sch. F. Corp. Governance (Oct. 10, 2025), https://corpgov.law.harvard.edu/2025/10/10/shareholder-engagement-under-the-new-13g-regime-key-takeaways-from-recent-panel/.

[25] *Id.*

[26] *See* Maynard Nexsen LLP, *A New Chapter in Shareholder Engagement? What the SEC's Revised Schedule 13G/D Guidance Means for Public Companies* (Mar. 6, 2025), https://www.maynardnexsen.com/publication-a-new-chapter-in-shareholder-engagement-what-the-secs-revised-schedule-13g-d-guidance-means-for-public-companies.

[27] *See* David A. Katz, Elina Tetelbaum & Loren Braswell, *Shareholder Activism: Ten Trends for 2026*, Harv. L. Sch. F. Corp. Governance (Oct. 16, 2025), https://corpgov.law.harvard.edu/2025/10/16/shareholder-activism-ten-trends-for-2026/.

[28] *See* Scott A. Barshay et al., *supra* note 22; Maynard Nexsen LLP, *supra* note 26.

[29] *See* Maynard Nexsen LLP, *supra* note 26.

[30] *See* Adam Fleisher et al., *New SEC Staff Guidance on "Passive Investor" Status for Schedule 13G*, Cleary Gottlieb LLP (Feb. 18, 2025), https://www.clearygottlieb.com/-/media/files/alert-memos-2025/new-sec-guidance-on-passive-investor-status-for-13g.pdf.

C. Proxy Advisors

Proxy advisory firms are independent third-party firms providing recommendations to shareholders on various matters, particularly in the context of the annual proxy.[31] Some commentators have hypothesized that the role of these consulting firms may become more important in the absence of an open communication channel between institutional investors and company management.[32] Both parties may rely more on proxy advisors, who are not subject to the new C&DI and are able to discuss governance issues freely with company managers.[33] Companies may also dedicate more resources to engagements with proxy advisors, in order to ensure that their governance practices are aligned with proxy voting guidelines. Cementing the role of proxy advisors as intermediaries and rendering their recommendations more influential would be an inadvertent consequence of the new guidance, given the current administration's intention to regulate proxy advisors more closely.[34] In fact, regulators have indicated that proxy advisors exert undue influence on the corporate world.[35]

D. Shareholder Activists

Another unanticipated consequence of the new C&DI may be its positive impact on activist shareholders. Companies with an activist investor in their stock may encounter challenges getting meetings with passive or institutional holders who may want to protect their 13G eligibility by distancing themselves from any issues that are at the forefront of a proxy contest.[36]

However, panelists at a recent discussion convened by the Society for Corporate Governance, in collaboration with Kirkland & Ellis LLP, disputed the existence of a "tilted playing field," where activists can easily get in touch with institutional investors at the expense of issuers.[37]

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[31] *See* David F. Larcker & Brian Tayan, *Seven Questions about Proxy Advisors*, Harv. L. Sch. F. Corp. Governance (May 13, 2024), https://corpgov.law.harvard.edu/2024/05/13/seven-questions-about-proxy-advisors/.

[32] *See* Ron Mueller et al., *The Passive/Aggressive Investor: Significant New SEC Staff Interpretive Guidance on Schedule 13G Eligibility*, Gibson Dunn & Crutcher LLP (Feb. 18, 2025), https://www.gibsondunn.com/passive-aggressive-investor-significant-new-sec-staff-interpretive-guidance-on-schedule-13g-eligibility/.

[33] *See* Adam Fleisher et al., *supra* note 30.

[34] *See* Kirk Ogunrinde, *Why These Giant Proxy Advisers—ISS, Glass Lewis—Are Under Scrutiny By The White House, FTC*, Forbes (Nov. 13, 2025), https://www.forbes.com/sites/kirkogunrinde/2025/11/13/why-these-giant-proxy-advisers-iss-glass-lewis-are-under-scrutiny-by-the-white-house-ftc/.

[35] *See generally Exposing the Proxy Advisory Cartel: How ISS & Glass Lewis Influence Markets Before the Subcomm. on Cap. Mkts. of the H. Comm. on Fin. Servs.*, 119th Cong. (2025), https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=409697.

[36] *See* Maia Gez et al., *supra* note 19.

[37] Spierings, Thomas & Mathew, *supra* note 24.

III. A Move in the Right Direction?

A. The Case for Yes

The SEC views the new C&DI guidance as a common-sense interpretation of the Exchange Act, portraying the prior guidance as a departure from the law. During his remarks at the "SEC Speaks" 2025 Conference, Commissioner Uyeda relied on a textualist interpretation of the term "influencing control," citing a common dictionary definition of "influencing:" "the act or power of producing an effect without apparent exertion of force or direct exercise of command."[38] According to Commissioner Uyeda, the new C&DI is more permissive than the strictest interpretation of this definition, requiring "something more than the mere planting of an idea with management in order to lose Schedule 13G eligibility."[39]

Commissioner Uyeda characterized the result of the new guidance as a logical and straightforward interpretation of longstanding rules. According to his analysis, shareholders exercising pressure (via voting threats) on a board to undertake certain actions (such as make ESG-related disclosures) should naturally count as "influencing control" and require filling out a Schedule 13D.[40]

B. The Case for No

First, in defining "influence," the SEC introduces the new concept of "pressure," which some commentators have described as "subjective" and "difficult to administer in practice."[41] The C&DI does provide the example of an investor conditioning its support for an issuer's director nominees on the adoption of a certain policy. However, it is unclear what beyond this example would count as pressure. The interpretive challenges are compounded by the fact that "pressure," per this new C&DI, can be direct or indirect, express or implied.[42]

Second, as elaborated above, the new guidance may have unanticipated effects, resulting in an overall chilling of shareholder-management relationships across companies.[43] Due to the lack of communication, there might be more uncertainty overall and, thus, companies may have less visibility into

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[38] Mark T. Uyeda, Commissioner, U.S. Sec. & Exch. Comm'n, Remarks at the 'SEC Speaks' Conference 2025 (May 19, 2025).
[39] *Id.*
[40] *Id.*
[41] Ron Mueller et al., *supra* note 32.
[42] *Id.*
[43] *See supra* Section II.

their shareholders' preferences.[44] Engagement may also become a more costly endeavor, because companies will have to invest more in preemptive disclosures. Such disclosures will have to be as thorough as possible: all the issues that would have been discussed over the course of several conversations now may need to be explained upfront. Finally, proxy advisors may play an increasingly important role, despite the current administration's plans to curb their influence.[45]

C. Engagement as an Obstacle Course: Capital Market Participants Will Adjust

The new C&DI risks imposing barriers for shareholder engagement, which represents a crucial tool for addressing the information asymmetries built into the public company framework. Although investors must vote on director elections, as well as on management and shareholder proposals, they often lack information needed for casting these votes. Such information gaps are particularly pronounced in the case of institutional investors who own shares in hundreds of companies. The filings or public disclosures often fail to capture all the information. This is where engagement comes in: it allows investors to understand the full context of issues on the ballot.[46]

The academic literature reports on the agency issues affecting institutional investors,[47] which may be compounded by the C&DI. Bebchuk, Cohen & Hirst argue that investors start off with a disincentive to engage with managers and conduct stewardship activities because: (1) they capture only a small portion of the benefits resulting from such stewardship while bearing the full costs; and (2) they have private incentives, such as interest in obtaining business from corporations, that incentivize them to cultivate amicable relationships with corporation managers.[48] The new C&DI may serve as an additional obstacle for institutional investors to invest in stewardship, on top of these factors encouraging passivity.

Empirically, the short-term immediate impact of this C&DI has been quite stark, resulting in major players, such as Vanguard, pausing some of their meetings with management.[49] Ceasing all forms of engagement widens information gaps, depriving corporate actors of the most effective tool for filling such gaps. The long-term impact of the new C&DI is yet to be assessed.

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[44] Katz, Elina Tetelbaum & Braswell, *supra* note 27.
[45] *See* Ron Mueller et al., *supra* note 32.
[46] Spierings, Thomas & Mathew, *supra* note 24.
[47] *See* Bebchuk, Cohen & Hirst, *supra* note 4, at 90.
[48] *See id.*
[49] *See* Ross Kerber, *Exclusive-Vanguard pauses corporate meetings over new ESG guidance*, Reuters (Feb. 19, 2025), https://www.reuters.com/business/finance/vanguard-pauses-corporate-meetings-over-new-esg-guidance-2025-02-19/.

What is certain is that both institutional investors and company management will adapt. This process has already started: industry insiders have reported new protocols implemented by institutional investors, such as disclaimers that they are not exerting control and refraining from signaling voting intentions during discussions.[50] To make the transition as smooth as possible, the SEC should explain how the guidance will be applied in practice. An important open question involves institutional investors' written down proxy voting policies: is pointing to those policies a form of "exerting control"?

Conclusion

Experts highlight a recent shift in the SEC's regulatory approach towards a more "pro-company" stance.[51] Indeed, the guidance on Schedule 13G eligibility was accompanied by other policy changes such as a new Staff Legal Bulletin making it easier for companies to exclude shareholder proposals [52] and a new C&DI restricting the use of exempt solicitation notices.[53] Together, these changes alter the balance between companies' management and their investors. While the ball may seem to be in company management's court, shareholders still retain leverage due to their proxy voting power. How the two sides will navigate this new dynamic remains an open question.

[50] *See* Spierings, Thomas & Mathew, *supra* note 24.
[51] Scott A. Barshay et al., *supra* note 22.
[52] *See generally* SEC Staff Legal Bulletin No. 14M (CF) (Feb. 12, 2025).
[53] *See generally* SEC Compliance and Disclosure Interpretations: Notices of Exempt Solicitation (Jan. 27, 2025).