
Proxy Rules and Schedules 14A/14C

Last Update: May 11, 2018

These Compliance and Disclosure Interpretations (“C&DIs”) comprise the Division’s interpretations of the proxy rules and Schedules 14A/C. They 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](#) (“Telephone Interpretations”). In particular, C&DIs 124.01, 124.07, 126.02, 151.01, 161.03, and 163.01 reflect substantive changes to the Telephone Interpretations. C&DIs 126.04, 126.05, 158.01, and 158.03 reflect technical revisions to the Telephone Interpretations. The remaining C&DIs reflect only non-substantive changes to the Telephone Interpretations. The Division currently is in the process of updating other previously-published interpretations relating to the proxy rules and any revised or new interpretations will be published here.

The bracketed date following each C&DI is the latest date of publication or revision.

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Sections 101 to 115. Section 14

Section 101. General

Question 101.01

Question: A cooperative subject to reporting obligations under Exchange Act Section 12 has a procedure for sending an advisory ballot to its members seeking their recommendations on who should be nominated to the board of directors. Are these advisory vote materials subject to the requirements of Exchange Act Section 14(a) and Regulation 14A?

Answer: Yes, the advisory vote materials constitute a solicitation for the election of directors. Accordingly, the advisory vote materials, including the advisory ballot, are required to comply with the requirements of Section 14(a) and Regulation 14A. [May 11, 2018]

Sections 116 to 120. [Reserved]

Sections 121 to 150. Regulation 14A, Solicitation of Proxies

Section 121. [Reserved]

Section 122. Rule 14a-2

Question 122.01

Question: Does a person holding securities in several nominee accounts count as one “person” for purposes of Rule 14a-2(b)(2)?

Answer: Yes. [May 11, 2018]

Question 122.02

Question: Does providing a form of proxy to a security holder in response to that security holder’s unsolicited request count against the ten-person limit of Rule 14a-2(b)(2)?

Answer: No, because such an act is not a solicitation under Rule 14a-1(l)(2)(i). [May 11, 2018]

Question 122.03

Question: Can the filing of a Schedule 13D preclude reliance on Rule 14a-2(b)(2)?

Answer: Yes. A dissident intending to engage or engaging in a solicitation of no more than ten persons under Rule 14a-2(b)(2) should be mindful that its filing of a Schedule 13D – depending on the content of this document and other relevant facts and circumstances – may constitute a more widespread solicitation that may preclude reliance upon Rule 14a-2(b)(2). For example, the filing of a Schedule 13D that states no more than what is explicitly required by the schedule generally would not be viewed as a more widespread solicitation. By contrast, where the Schedule 13D or any of its exhibits invites security holders to contact the filer in order to discuss the solicitation, or urges security holders to take some action, the Schedule 13D filing may be viewed as a solicitation of all of the registrant’s security holders. [May 11, 2018]

Question 122.04

Question: If securities are purchased prior to the record date, but title does not pass until after the record date, would the efforts by the purchaser to obtain proxies from the sellers be an exempt solicitation under Rule 14a-2(a)(2)? Would such efforts count toward the ten-person limitation of Rule 14a-2(b)(2)?

Answer: As these efforts would be an exempt solicitation under Rule 14a-2(a)(2), which exempts any solicitation by a person in respect of securities of which he or she is the beneficial owner, they would not count towards the ten-person limitation in Rule 14a-2(b)(2). [May 11, 2018]

Section 123. Rule 14a-3

Question 123.01

Question: If the information in an annual report to security holders required by Rule 14a-3 is included in a proxy statement contained in a Form S-4 filed for the same security holder meeting, is a separate Rule 14a-3 annual report nevertheless required?

Answer: No. [May 11, 2018]

Question 123.02

Question: A limited partnership has units registered under Exchange Act Section 12, but it does not hold director elections and therefore does not solicit proxies for the election of directors. Is the limited partnership required to file copies of its annual report with the Commission pursuant to Rule 14a-3?

Answer: No. [May 11, 2018]

Question 123.03

Question: Would a special meeting of a limited partnership held for the purpose of adding a general partner be an annual meeting (or a special meeting in lieu of an annual meeting) of security holders to elect directors of a corporation for purposes of Exchange Act Rule 14a-3?

Answer: Yes. Accordingly, an annual report prepared in accordance with Rule 14a-3 should be provided to the limited partners in connection with the meeting. However, the limited partnership would not be required to provide more than one annual report to its limited partners during any fiscal year. [May 11, 2018]

Question 123.04

Question: What does the reference to the “most recent fiscal years” in Rule 14a-3(b)(1) mean?

Answer: The “most recent fiscal years” referenced in Rule 14a-3(b)(1) are the most recently completed fiscal years as of the date of a registrant’s annual meeting, not as of the date the registrant mails proxy materials for its annual meeting. For example, a registrant with a December 31 fiscal year end, holding an annual meeting in early February 2018, must include audited balance sheets as of the end of each of fiscal years 2017 and 2016 in the annual report that accompanied or preceded the annual meeting proxy statement. [May 11, 2018]

Section 124. Rule 14a-4

Question 124.01

Question: Rule 14a-4(b)(1) states that a proxy may confer discretionary authority with respect to matters as to which a choice has not been specified by the security holder, so long as the form of proxy states in bold-faced type how the proxy holder will vote where no choice is specified. If action is to be taken with respect to the election of directors and the persons solicited have cumulative voting rights, can a soliciting party cumulate votes among director nominees by simply indicating this in bold-faced type on the proxy card?

Answer: Yes, as long as state law grants the proxy holder the authority to exercise discretion to cumulate votes and does not require separate security holder approval with respect to cumulative voting. [May 11, 2018]

Question 124.02

Question: When is notice of a non-Rule 14a-8 matter to be presented to a vote considered to be untimely under Rule 14a-4(c)?

Answer: Notice of a non-Rule 14a-8 matter to be presented to a vote that the registrant receives after the Rule 14a-4(c)(1) “timeliness” deadline (i.e., as measured under the registrant’s advance notice

provision or, absent such a provision, the 45-day standard of Rule 14a-4(c)(1)) is considered untimely. This means that a registrant can exclude the matter from its proxy statement, while preserving discretionary authority to vote management proxies on such matter, as long as the registrant includes a specific statement in its proxy statement regarding how it intends to exercise its discretionary authority to vote on the matter if presented at the meeting. Additional disclosure may be necessary to satisfy Rule 14a-9. State law governs whether the matter may be properly introduced and voted upon at the meeting. [May 11, 2018]

Question 124.03

Question: If the last day of the 45-day deadline in Rule 14a-4(c)(1) for a registrant to receive timely notice from a security holder of a matter to be presented to a vote outside of Rule 14a-8 is not a business day (e.g., such last day is a weekend day or a holiday), when does the notice have to be received in order to be timely for purposes of the rule?

Answer: The notice must be received on the preceding business day. [May 11, 2018]

Question 124.04

Question: If a registrant has an advance notice by-law or charter provision that governs when notice of a matter is deemed to be timely, may it exercise discretionary voting authority in accordance with Rule 14a-4(c)(1)?

Answer: Yes. A registrant that has an advance notice by-law or charter provision governing when notice of a matter is deemed timely may exercise discretionary voting authority in accordance with Rule 14a-4(c)(1), even if the advance notice provision does not specifically reference the use of discretionary voting authority. [May 11, 2018]

Question 124.05

Question: For purposes of determining whether it has discretionary authority under Rule 14a-4(c)(1), should a registrant rely on the deadline prescribed in its advance notice provision for submission of non-Rule 14a-8 matters, or should it instead rely on the 45-day deadline specified in Rule 14a-4(c)(1)?

Answer: A registrant must rely on the deadline for submission of non-Rule 14a-8 matters prescribed in its advance notice provision in determining when notice of a matter is received in a timely manner for purposes of Rule 14a-4(c)(1). See Exchange Act Release No. 39093 (Sept. 18, 1997) (noting that Rule 14a-4(c)(1) is not intended “to interfere with the operation of state law authorized definitions of advance notice set forth in corporate bylaws and/or articles of incorporation...”). Hence, if a registrant’s advance notice provision requires receipt of notice of a matter 60 days before the date on which the registrant mailed its proxy materials for the prior year’s annual meeting of security holders, the registrant should use this deadline to determine compliance with the “timely notice” standard defined in Rule 14a-4(c)(1), rather than the 45-day period in Rule 14a-4(c)(1). [May 11, 2018]

Question 124.06

Question: When a registrant has changed its annual meeting date to be more than 30 days from the date it was held the prior year, or if the registrant did not hold an annual meeting last year, what is a “reasonable time” for notice of a matter to be submitted by a security holder for purposes of Rule 14a-4(c)(1)?

Answer: The term “reasonable time” should be determined based upon the particular facts and circumstances. In such a situation, the registrant must publicly disclose through means reasonably calculated to inform security holders the date change and the date by which a notice of a matter proposed by security holders must be received. [May 11, 2018]

Question 124.07

Question: The Division has permitted registrants to avoid filing proxy materials in preliminary form despite receipt of adequate advance notification of a non-Rule 14a-8 matter as long as the registrant disclosed in its proxy statement the nature of the matter and how the registrant intends to exercise discretionary authority if the matter was actually represented for a vote at the meeting. See Section IV.D of Release No. 34-40018 (May 21, 1998). Can a registrant rely on this position if it cannot properly exercise discretionary authority on the matter in accordance with Rule 14a-4(c)(2)?

Answer: No. [May 11, 2018]

Question 124.08

Question: When a registrant receives notice of a matter submitted by a security holder that is timely but deficient for purposes of Rule 14a-4(c)(2)(i.e., it does not comply with the requirements listed in the rule by, for example, failing to indicate that the security holder intends to deliver a proxy statement and form of proxy to holders of at least that percentage of the registrant’s voting shares necessary to approve the matter), does the registrant have discretionary voting authority on the matter?

Answer: If the notice is timely but deficient, the registrant would not be required to put the matter on its proxy card. The registrant’s ability to exercise discretionary authority, however, is conditioned on including in its proxy statement advice on the nature of the matter and how the registrant intends to exercise its discretion to vote on that matter. The registrant’s ability to avoid filing a preliminary proxy statement and instead file a definitive proxy statement pursuant to Rule 14a-6 will depend upon, among other factors, the extent of its comments on, or discussion in, its proxy material of any solicitation in opposition in connection with the meeting. [May 11, 2018]

Section 125. [Reserved]

Section 126. Rule 14a-6

Question 126.01

Question: If a registrant proposes to approve or ratify awards made pursuant to a compensation plan, is it required to file the proxy statement in preliminary form?

Answer: Yes. While Rule 14a-6(a)(5) relieves registrants of the obligation to file a proxy statement in preliminary form for solicitations relating to the approval or ratification of a compensation plan or amendments, it does not extend to the ratification or approval by security holders of awards made pursuant to such plans. [May 11, 2018]

Question 126.02

Question: Is a registrant required to file a preliminary proxy statement in connection with a proposed corporate name change to be submitted for security holder approval at the annual meeting?

Answer: No. As set forth in Release No. 34-25217 (Dec. 21, 1987), the underlying purpose of the exclusions from the preliminary proxy filing requirement is “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.” Consistent with this purpose, a change in the registrant’s name, by itself, does not require the filing of a preliminary proxy statement. [May 11, 2018]

Question 126.03

Question: How are “days” counted for purposes of the “10 calendar day” period in Rule 14a-6?

Answer: For purposes of calculating the “10 calendar day” period in Rule 14a-6, the date of filing is day one pursuant to Rule 14a-6(k). For example, if the preliminary proxy statement is filed on January 6, then January 15 would be day ten for purposes of Rule 14a-6. The registrant may send the definitive proxy statement to security holders starting at 12:01 a.m. on January 16. [May 11, 2018]

Question 126.04

Question: Can a registrant that filed a Form S-4 send proxy cards to its security holders upon the filing of a preliminary proxy statement/prospectus?

Answer: No, as Exchange Act Rule 14a-4(f) prohibits the delivery of proxy cards unless the security holders concurrently or previously received a definitive proxy statement filed with the Commission. Further, because a vote on the transaction described also would amount to a sale of the securities being registered, no proxy card can be sent until after the Form S-4 is declared effective and the final prospectus has been furnished to security holders. [May 11, 2018]

Question 126.05

Question: A registrant files a registration statement on Form S-4 that contains its proxy statement disclosure pursuant to Instruction E.1 of Form S-4. After the effective date of the registration statement, the registrant sends an additional communication to security holders relating to the transaction. Does this communication need to be filed as other soliciting material pursuant to Rule 14a-6(b) no later than the date it is first sent or given to security holders?

Answer: Yes. Given the communication was sent after the furnishing of the definitive proxy statement, it should not be filed under Rule 14a-12. [May 11, 2018]

Sections 127 to 132. [Reserved]

Section 133. Rule 14a-13

Question 133.01

Question: Is a broker search letter a proxy solicitation within the meaning of Exchange Act Rule 14a-1(l)?

Answer: No, it is not a proxy soliciting material where it is sent to a broker and only requests information about the number of copies of the proxy materials that the broker will need to forward to beneficial owners. [May 11, 2018]

Sections 151 to 164. Schedule 14A: Information Required in Proxy Statement

Section 151. General

Question 151.01

Question: A registrant solicits its security holders to approve the authorization of additional common stock for issuance in a public offering. While the registrant could use the cash proceeds from the public offering as consideration for a recently announced acquisition of another company, it has alternative means for fully financing the acquisition (such as available credit under an executed credit agreement in the full amount of the acquisition consideration) and may choose to use those alternative financing means instead. Would the proposal to authorize additional common stock “involve” the acquisition for purposes of Note A of Schedule 14A?

Answer: No. Raising proceeds through a sale of common stock is not an integral part of the acquisition transaction because at the time the acquisition consideration is payable, the registrant has other means of fully financing the acquisition. The proposal would therefore not involve the acquisition and Note A would not apply. By contrast, 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. [May 11, 2018]

Sections 152 to 154. [Reserved]

Section 155. Item 4

Question 155.01

Question: Is a subsidiary created by a parent for the purpose of engaging in a proxy solicitation a participant in the solicitation?

Answer: Yes. Both the parent and the subsidiary would be participants in the solicitation pursuant to Instruction 3(a)(vi) to Item 4 of Schedule 14A. [May 11, 2018]

Sections 156 to 157. [Reserved]

Section 158. Item 7

Question 158.01

Question: A registrant will hold a special meeting to elect one new person to its board of directors. The incumbent directors were elected at the annual security holder meeting three months ago and will not be up for re-election. Do the proxy materials for the special meeting have to include the information required by Items 7 and 8 of Schedule 14A for the incumbent directors?

Answer: Yes. [May 11, 2018]

Question 158.02

Question: Does a registrant soliciting proxies for a special meeting at which management will propose a classification of the board of directors (but not the election of any directors under the proposed new board structure) need to include information pursuant to Items 7 and 8 of Schedule 14A in the proxy statement for the special meeting?

Answer: No, provided that the proposal, if adopted, will not have the effect of shortening or lengthening the term of any incumbent directors. [May 11, 2018]

Question 158.03

Question: B is to be merged into A in a Rule 145 transaction. B's security holders will be voting to approve the proposed transaction and will become security holders of A. A's security holders are not voting on the proposed transaction. Three of B's directors will become directors of A. Is it necessary to include the information required by Items 7 and 8 of Schedule 14A as to the directors of A in A's Form S-4, which includes B's proxy statement?

Answer: Yes. Pursuant to Note A to Schedule 14A, the Form S-4 should contain the information required by Items 7 and 8 of Schedule 14A as to the A directors. [May 11, 2018]

Sections 159 to 160. [Reserved]

Section 161. Item 10

Question 161.01

Question: Do all actions on compensation plans that must be submitted for security holder approval need all of the disclosure required under Item 10 of Schedule 14A?

Answer: Any action on a compensation plan that must be submitted for security holder approval requires all of the disclosure called for under Item 10 of Schedule 14A. If the action proposed is only an amendment to an existing plan (e.g., adding shares available under an option plan, or adding a new class of participants), the Item 10 disclosure still must include a complete description of any material features of the plan (Item 10(a)(1)), including the material differences from the existing plan (Instruction 2). [May 11, 2018]

Question 161.02

Question: When should registrants provide the disclosure required by Item 10(a)(2)(i) of Schedule 14A regarding the benefits or amounts that will be received or allocated to each of the named executive officers and certain groups?

Answer: Item 10(a)(2)(i) disclosure regarding benefits or amounts that will be received by or allocated to each of the named executive officers and certain groups will only be called for if the plan being acted upon is: (i) a plan with set benefits or amounts (e.g., director option plans); or (ii) one under which some grants or awards have been made by the board or compensation committee subject to security holder approval (e.g., action is to add shares available under an existing option plan because there are not enough shares remaining under the plan to honor exercises of all outstanding options). [May 11, 2018]

Question 161.03

Question: If a registrant is required to disclose the New Plan Benefits Table called for under Item 10(a)(2) of Schedule 14A, should it list in the table all of the individuals and groups for which award and benefit information is required, even if the amount to be reported is “0”?

Answer: Yes. Alternatively, the registrant can choose to identify any individual or group for which the award and benefit information to be reported is “0” through narrative disclosure that accompanies the New Plan Benefits Table. [May 11, 2018]

Question 161.04

Question: Can a registrant include other information, such as that called for by Item 10(b) of Schedule 14A, in the New Plan Benefits Table mandated by Item 10(a)(2) of Schedule 14A?

Answer: No. [May 11, 2018]

Question 161.05

Question: Should a registrant report the “dollar value” for option plans in the New Plan Benefits Table required by Item 10(a)(2) of Schedule 14A?

Answer: For option plans, no “dollar value” information should be given in the table (i.e., no Black-Scholes or other valuation). The number of shares underlying the options should be provided in the “Number of Units” column. [May 11, 2018]

Question 161.06

Question: Does Item 10(a)(2)(iii) of Schedule 14A require disclosure of actual awards made under an existing plan for the prior fiscal year?

Answer: No. The language of Item 10(a)(2)(iii) stating “if the plan had been in effect” contemplates plans that were not in effect for the prior fiscal year. Accordingly, Item 10(a)(2)(iii) disclosure of actual awards under an existing plan for the last fiscal year is not required. Disclosure under this item would be required when action is being taken on an existing plan only where the existing plan is being amended to alter a formula or other objective criteria to be applied to determine benefits. [May 11, 2018]

Question 161.07

Question: Does Item 10(a)(2)(i) or 10(a)(2)(iii) of Schedule 14A require a “pro forma” presentation of the benefits or amounts that would have been received under a plan where such awards or benefits are discretionary?

Answer: No, as such discretionary awards or benefits would not be considered to be determinable for purposes of these two item requirements. [May 11, 2018]

Question 161.08

Question: Does the disclosure requirement in Item 10(a)(2)(iii) of Schedule 14A apply to all compensation plans?

Answer: This disclosure requirement applies only to plans that have objective criteria for determining the compensation payable under the plan so that the registrant can take the criteria and, assuming the variables of the last year, determine what would have been paid under the plan had it been in place then. An example would be a bonus or long-term incentive plan with award opportunities based upon a

fixed percentage of salary and actual payment earned based upon corporate performance against fixed measures (such as percentage growth in earnings over previous years). [May 11, 2018]

Question 161.09

Question: How should the “market value of the securities underlying the options, warrants, or rights as of the latest practicable date” be calculated for purposes of Item 10(b)(2)(i)(D) of Schedule 14A?

Answer: The “market value of the securities underlying the options, warrants, or rights as of the latest practicable date” may be presented as either: (i) market price per share or (ii) aggregate market value of the total number of shares underlying all options (granted or available for grant) under the plan. [May 11, 2018]

Question 161.10

Question: Does Item 10(b)(2)(ii) of Schedule 14A, which requires the registrant to state separately the amount of options received or to be received, cover options under all plans or only the plan upon which action is to be taken?

Answer: The requirement covers only options under the plan upon which action is being taken. For example, it would be inapplicable if a new plan was being considered because there would be no grants under that new plan to report. No disclosure is required if a new plan is being considered, even if the registrant has other plans under which there have been or will be options granted, and even if a previous or existing plan appears identical to the new plan in all but name. [May 11, 2018]

Question 161.11

Question: Does the disclosure under Item 10(b)(2)(ii) of Schedule 14A need to appear in a table?

Answer: No. This disclosure does not have to be in a table; narrative disclosure is acceptable. [May 11, 2018]

Question 161.12

Question: Does Item 10(b)(2)(ii) of Schedule 14A apply only to options received during the last year?

Answer: No. It applies to all options received at any time (not just last year) and options to be received (if determinable) by the specified persons and groups. The information called for under this item requirement should be given for each individual and group (including those for which the amount of options received or to be received is “0”). [May 11, 2018]

Section 162. [Reserved]

Section 163. Item 12

Question 163.01

Question: Does a proxy statement seeking security holder approval for the elimination of preemptive rights from a security involve a modification of that security for purposes of Item 12 of Schedule 14A?

Answer: Yes. Accordingly, financial and other information would be required in the proxy statement to the extent required by Item 13 of Schedule 14A. [May 11, 2018]

Section 164. Item 13

Question 164.01

Question: Does a proxy statement seeking security holder approval of an increase in authorized common shares and the elimination of an authorized but unissued class of preferred stock require the inclusion or incorporation of financial statements?

Answer: No, unless the authorization is being sought in connection with an exchange, merger, consolidation, acquisition, or similar transaction. See Instruction 1 of Item 13 of Schedule 14A. [May 11, 2018]

Question 164.02

Question: Is it permitted for a proxy statement to incorporate by reference the financial information required by Item 13(a) of Schedule 14A from a prospectus?

Answer: Yes. The proxy statement may incorporate by reference from a prospectus the information required by Item 13(a) despite the fact that Item 13(b)(2) refers only to a previously-filed “statement or report.” [May 11, 2018]

Question 164.03

Question: Are the financial statements required by Item 13 of Schedule 14A needed for a proxy statement filed in connection with a merger that is intended solely to change the registrant’s domicile from one state to another?

Answer: No. [May 11, 2018]

Question 164.04

Question: Instruction 1 to Item 13 of Schedule 14A states that the information required by Item 13(a) is not deemed material where the matter to be acted upon is the authorization of preferred stock for issuance for cash in an amount constituting fair value. For purposes of this instruction, is the issuance of preferred stock upon conversion of debentures the equivalent to the authorization of preferred stock for cash?

Answer: No, they are not equivalent. Therefore, the registrant must provide Item 13 financial information in the proxy statement to the extent the financial information is material. [May 11, 2018]

Sections 165 to 200. [Reserved]