

## SEC Division of Corporation Finance Issues C&DIs Regarding Notices of Exempt Solicitation

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On July 31, the staff of the Division of Corporation Finance (the Staff) of the Securities and Exchange Commission released two new Compliance and Disclosure Interpretations (C&DIs), in the Proxy Rules and Schedules 14A/14C section, providing guidance on the use of Notices of Exempt Solicitation.

Under Rule 14a-6(g) of the Securities Exchange Act 1934 (the Exchange Act), a person beneficially owning more than \$5 million of a company's securities that conducts a solicitation of the company's shareholders, but does not seek the power to act as proxy, is required to file with the SEC a Notice of Exempt Solicitation, including all written materials used in such solicitation. Although Rule 14a-6(g)(1) sets out when a Notice of Exempt Solicitation is required to be filed, the Staff has accepted voluntary filings from persons who do not meet the rule's ownership threshold. Further, while Rule 14a-6(g)(1) requires a Notice of Exempt Solicitation to contain the information specified in Rule 14a-103 of the Exchange Act, including the name and address of the filer. The Staff had not previously addressed where in the filings such information was required to be included, leaving some investors confused as to whether vague Notices of Exempt Solicitation were filed by the company itself.

In C&DI 126.06, the Staff confirmed that Notices of Exempt Solicitation may be filed voluntarily with the SEC, and clarified that it will not object to a voluntary submission of a Notice of Exempt Solicitation, as long as such notice clearly states that it is being filed voluntarily. The Staff notes that this new guidance will remove ambiguity from such filings by informing investors of the nature of the submission and that the Notice of Exempt Solicitation is being filed by a soliciting party that does not beneficially own more than \$5 million of the class of subject securities.

C&DI 126.07 clarifies that all Notices of Exempt Solicitation, whether voluntary or compulsory, must include a cover page containing information about its filer. The Staff states that the Rule 14a-103 information is intended to be a “cover,” before any written soliciting materials (including any logo or other graphics used by the soliciting party) are presented. If the information required by Rule 14a-103 is not presented in this manner, the Staff may, depending on the particular facts and circumstances, consider such filing “misleading” within the meaning of Rule 14a-9 of the Exchange Act. This is expected to alleviate some of the investor confusion surrounding Notices of Exempt Solicitation requirements by making it clear to investors the party responsible for a particular filing.

The Staff’s new C&DIs is available [here](#).

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