

NEW SEC GUIDANCE INCREASES FLEXIBILITY IN SOLICITATIONS, OFFERINGS, SPINOFFS AND M&A

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WHAT HAPPENED

On Friday Jan. 23, the staff of the SEC published a variety of new or revised rule interpretations generally designed to increase flexibility, consistent with the SEC's recent declared focus on promoting public markets and capital raising while protecting investors.

TAKEAWAYS

The new guidance addresses the following topics:

PROXY SOLICITATIONS

- **No more voluntary notices of exempt solicitations.** Holders of less than \$5 million of securities of a company may not submit Notices of Exempt Solicitations – which are required for holders more than \$5 million of a class of covered securities. Having recently observed that the “vast majority” of such filings are voluntary submissions, the staff will now object to such submissions by small holders. Revised Question 126.06 (Redlined).
- **More flexible timing for broker searches.** As a result of technological developments, the staff will not object to less than 20-business day searches where the company “reasonably believes” proxy materials will be “timely disseminated” and otherwise complies with Rule 14a-13. New Question 133.02. (Same principle also applies to information statements.)
- **Non-compliance with 14c-2 notice requirements for action by written consent not fatal.** Failure to comply with the 20-calendar-day requirement in Rule 14c-2 (to distribute information statements at least 20 business days before effective date) – without being solicited by the company – does not invalidate the corporate action. Where written consents were solicited by a dissident security holder without the company’s knowledge, the staff will not object to the company’s failure to comply as long as it distributes the required information statement as soon as practicable after it becomes aware of the written consents. New Question 182.01.

PRIVATE PLACEMENTS UNDER RULE 152

- **Private offering possible after general solicitation.** A company conducting a Rule 506(b) private placement can sell to individuals contacted in an earlier 506(c) general solicitation if it can establish a prior “substantive relationship” with the offerees, as explained in the new guidance. [New Question 148.01](#).
- **Private offering possible after registration statement goes effective.** The “mere fact that a registration statement is effective” does not by itself raise integration concerns under Rule 152. [New Question 148.02](#).
- **Private offering possible after failed shelf takedown.** A company can complete an unsuccessful takedown as a private offering under Section 4(a)(2) or Rule 506(b) by complying with the general principles of integration in [Rule 152\(a\)](#). [Revised Question 148.03](#) (redlined).

ACCREDITED INVESTORS

- **Looking-through entities allowed.** When an entity does not qualify as accredited on its own merits, an issuer can look through various forms of equity ownership to natural persons in determining accredited investor status in accordance with [Note 1 to Rule 501\(a\)\(8\)](#). [Revised Question 255.06](#).
- **Varying methods of verification allowed.** An issuer can use different methods in the same offering to verify the accredited investor status for different investors. [New Question 260.39](#).

EXECUTIVE COMPENSATION

- **New test when historical compensation in spin-off required.** Going forward, the requirement to include historical compensation of spinco NEOs depends on whether the entity operated as a separate division or standalone business of the parent and, if so, whether there is continuity of management, as explained in the new guidance. It also clarifies that when historical compensation is not required, the company need only report compensation awarded to, earned by, or paid to NEOs in connection with and following the spin-off. [Revised Question 217.01](#).

M&A TRANSACTIONS

- **Lock-ups in registered transactions.** The new guidance expands and clarifies circumstances when a company can enter into lock-ups or tender agreements with security holders before filing S-4/F-4 registration statements. [Revised Question 139.29 \(Redlined\)](#), [Revised Question 139.30 \(Redlined\)](#) and [Revised Question 239.13 \(Redlined\)](#).

- **Permissible purchases outside cross-border tender offers.** An exception in Rule 14e-5(b)(10) allows purchases outside a Tier I tender offer where permitted by the laws of the subject company's home jurisdiction and the other conditions are met. Offering documents should disclose that purchases outside the Tier I offer have already occurred and, if true, may continue during the offer. The same applies to certain parallel disclosure conditions. [New Question 166.02](#).
- **Purchases by affiliates of financial advisors outside tender offers.** Purchases outside a tender offer in an "agent-of-the-offeror capacity" by an affiliate of the offeror's financial advisor must comply with Rule 14e-5(b)(12), including Rule 14e-5(b)(12)(F), which requires the tender offer price be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price. [Question 166.03](#).

MISCELLANEOUS

The SEC Staff clarified several interpretations and withdrew others that became obsolete or outdated as a result of recent rulemaking or interpretative guidance.

RELATED CAPABILITIES

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MEET THE TEAM



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