



C&DIs And The APA

By Keith Paul Bishop on February 15, 2012

On Monday, Broc Romanek [wrote](#) that the SEC's Division of Corporation Finance has issued a new Compliance & Disclosure Interpretation clarifying how say-on-pay proposals should appear on the proxy card. Many may welcome additional guidance from the staff. I'm concerned.

C&DIs reflect the views of the Corp Fin staff. Although the SEC's website claims that C&DIs are not rules, regulations, or statements of the SEC, I question whether that is strictly accurate. Section 551(4) of the Administrative Procedure Act defines "rule" to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . .".

Whether C&DIs constitute rules within the meaning of the APA, a more important policy question is whether the SEC should comply with the notice and comment rule making procedures of the APA (Section 553) when adopting new interpretations. The reality is that lawyers tend to view staff interpretations as authoritative, if not binding. While the notice and comment procedures mandated by the APA impose significant burdens on agencies, there are important benefits to following the rule making rules. These include:

- **Improved decision making** – The SEC can make more informed decisions when it receives input from the public. When the SEC uses notice and comment rulemaking, it often changes its position based on public comments.
- **Increased transparency** – The public is given notice of what the SEC intends to do rather than presented with a *fait accompli*. Further, the public can see the comments submitted and considered by the SEC. New interpretations will not just suddenly appear and the public can see who and what influenced the SEC's position.
- **Increased accountability** – The APA, other statutes and executive orders impose standards on agency rules. In recent years, the courts have struck down several SEC rules for failure to comply with the APA. See, e.g., *Business Roundtable v. S.E.C.*, 647 F.3d 1144 (2011), *American Equity Investment Life Insurance Company v. S.E.C.*, 613 F.3d 166 (D.C. Cir.2010), and *Chamber of Commerce v. S.E.C.*, 412 F.3d 133 (D.C. Cir.2005).

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California has its own Administrative Procedure Act that imposes even more stringent requirements on agency rule making. An agency rule that is adopted without compliance with the APA is commonly referred to as an “underground regulation” and may not be enforced:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a “regulation” under the APA unless it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA. Government Code Section 11340.5(a)

California, moreover, does not exempt interpretative rules and general statements of policy from the notice and comment requirements of the APA as does Section 553(b)(3)(A) of the federal APA.

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