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Skadden Discusses New SEC Pay-Versus-Performance Compliance & Disclosure Interpretations

By Erica Schohn, Joseph Penko, Loren Koles and Shalom Huber December 1, 2023

Comment

On November 21, 2023, the staff of the Securities and Exchange Commission’s (SEC’s) Division of Corporation Finance issued eight new Compliance & Disclosure Interpretations (C&DIs), and revised two previously issued C&DIs, relating to the final pay-versus-performance (PVP) disclosure rules adopted last year. These most recent C&DIs:

- supplement the C&DIs issued by the staff on February 10, 2023, and September 27, 2023;
- provide additional answers to some of the questions that companies encountered in complying with the PVP disclosure rules for the first time during the 2023 proxy season; and
- clarify certain portions of the earlier C&DIs subject to the most debate.

The new and revised C&DIs are included below.¹ For more information about the PVP rules and related disclosure requirements, see our previous client alerts “[SEC Staff Issues Additional Pay-Versus-Performance Compliance & Disclosure Interpretations](#)” (September 29, 2023), “[SEC Guidance Clarifies Some Issues Regarding Pay-Versus-Performance Disclosure, but Leaves Questions Unanswered](#)” (February 28, 2023) and “[SEC Adopts Long-Awaited Final Pay Versus Performance Disclosure Rules](#)” (August 31, 2022).

The existing C&DIs revised on November 21, 2023, are presented below, with changes marked:

Question 128D.07

Question: In each of 2020 and 2021, a registrant provided the same list of companies as a peer group in its Compensation Discussion & Analysis (“CD&A”) under Item 402(b) but provided a different list of companies in its CD&A for 2022. With respect to a registrant providing initial Pay versus Performance disclosure in its 2023 proxy statement for three years (as permitted by Instruction 1 to Item 402(v) of Regulation S-K), may the registrant present the peer group total shareholder return for each of the three years using the 2022 peer group?

Answer: No. In this situation, the registrant should present the peer group total shareholder return for each year in the table using the peer group disclosed in its CD&A for such year. In the 2024 proxy statement, if the registrant uses the same peer group for 2023 as it used for 2022, the registrant should present its peer group total shareholder return for each of the years in the table using the 2023 peer group. If it changes the peer group in subsequent years, it must provide disclosure of the change in accordance with Regulation S-K Item 402(v)(2)(iv). ~~[February 10, 2023]~~ [November 21, 2023]

Question 128D.18

Question: Some stock and option awards allow for accelerated vesting if the holder of such awards becomes retirement eligible. If retirement eligibility was the ~~only~~ sole vesting condition, would this condition be considered satisfied for purposes of the Item 402(v) of Regulation S-K disclosures and calculation of executive compensation actually paid in the year that the holder becomes retirement eligible?

Answer: Yes. However, ~~for awards with additional substantive conditions, in addition to if retirement eligibility, such as a market~~ condition as described in Question 128D.16, ~~these~~ other substantive conditions must also be considered in determining when an award has vested. Such conditions would include, but not be limited to, a market condition as described in Question 128D.16 or a condition that results in vesting upon the earlier of the holder’s actual retirement or the satisfaction of the requisite service period. ~~[September 27, 2023]~~ [November 21, 2023]

The new C&DIs issued on November 21, 2023, are presented below:

Question 128D.23

Question: Some stock awards entitle the holder to receive dividends or dividend equivalents paid on the underlying shares prior to the vesting date. If the dollar value of dividends or dividend equivalents paid are not reflected in the fair value of such awards, should they be included in the calculation of executive compensation actually paid?

Answer: Yes. Item 402(v)(2)(iii)(C)(1)(vi) of Regulation S-K requires the calculation of executive compensation actually paid to include dividends or dividend equivalents paid that are not already reflected in the fair value of stock awards or included in another component of total compensation. [November 21, 2023]

Question 128D.24

Question: When identifying a total shareholder return peer group under Regulation S-K Item 402(v)(2)(iv), the registrant must use either the same index or issuers used by it to comply with Item 201(e)(1)(ii) or the companies it uses as a peer group under Regulation S-K Item 402(b). If a registrant uses more than one “published industry or line-of-business” index for purposes of Item 201(e)(1)(ii), may a registrant choose which index it uses for purposes of its pay versus performance disclosure?

Answer: Yes. In order to provide clarity to investors, the registrant should include a footnote disclosing the index chosen. If the registrant chooses to use a different published industry or line-of-business index from that used by it for the immediately preceding fiscal year, it is required under Item 402(v)(2)(iv) to explain, in a footnote, the reason(s) for this change and compare the registrant’s cumulative total return with that of both the newly selected peer group and the peer group used in the immediately preceding fiscal year. [November 21, 2023]

Question 128D.25

Question: For purposes of determining the total shareholder return of a registrant’s peer group under Regulation S-K Item 402(v)(2)(iv), the registrant must use the same index or issuers used by it for purposes of Item 201(e)(1)(ii) or the companies it uses as a peer group for purposes of its disclosures under Item 402(b). If registrant discloses in its Compensation Discussion & Analysis that it determines the vesting of performance-based equity awards based on relative TSR compared to a broad-based equity index, can the registrant use that broad-based index as its peer group for purposes of Item 402(v)(2)(iv)?

Answer: No. Item 402(v)(2)(iv) does not contemplate the use of a broad-based equity index as a peer group for purposes of the pay versus performance disclosure. [November 21, 2023]

Question 128D.26

Question: Pursuant to Regulation S-K Item 402(v)(2)(iv), if the registrant’s peer group is not a published industry or line-of-business index, the identity of the issuers composing the group must be disclosed in a footnote. The returns of each component issuer of the group must be weighted according to the respective issuers’ stock market capitalization at the beginning of each period for which a return is indicated. In what circumstances is such market capitalization-based weighting required?

Answer: For purposes of Item 402(v)(2)(iv), the weighting requirement is applicable only if the registrant is not using a published industry or line-of-business index pursuant to Item 201(e)(1)(ii). [November 21, 2023]

Question 128D.27

Question: If a registrant that uses a peer group other than a published industry or line-of-business index as its peer group under Regulation S-K Item 402(v)(2)(iv) adds or removes any of the companies in the peer group, is it required to footnote the change(s) and compare its cumulative total shareholder return with that of both the updated peer group and the peer group used in the immediately preceding fiscal year?

Answer: Yes. However, consistent with Regulation S-K Compliance and Disclosure Interpretations Question 206.05, comparison of the registrant’s cumulative total return with that of both the newly selected peer group and the peer group used in the immediately preceding fiscal year is not required if (1) an entity is omitted solely because it is no longer in the line of business or industry, or (2) the changes in the composition of the index/peer group are the result of the application of pre-established objective criteria. In these two cases, a specific description of, and the bases for, the change must be disclosed, including the names of the companies deleted from the new index/peer group. [November 21, 2023]

Question 128D.28

Question: A smaller reporting company (SRC) with a December 31 fiscal year end provided scaled pay versus performance disclosure covering fiscal years 2021 and 2022 in its proxy statement filed in April 2023. It subsequently loses its SRC status based on its public float as of June 30, 2023. The registrant proposes to rely on General Instruction G(3) of Form 10-K to incorporate by reference executive compensation and other disclosure required by Part III of Form 10-K into its 2023 Form 10-K from its definitive proxy or information statement to be filed not later than 120 days after its 2023 fiscal year end. What pay versus performance information is the registrant required to include in such proxy or information statement?

Answer: The staff will not object if a registrant that loses SRC status as of January 1, 2024, continues to include scaled disclosure under Regulation S-K Item 402(v)(8) in its definitive proxy or information statement filed not later than 120 days after its 2023 fiscal year end from which the registrant's Form 10-K will forward incorporate the disclosure required by Part III of Form 10-K. The pay versus performance disclosure in such filing must cover fiscal years 2021, 2022, and 2023.

Unless the registrant regains SRC status in subsequent years, any other proxy or information statement in which Item 402(v) disclosure is required and that is filed after January 1, 2024, must include non-scaled pay versus performance disclosure. For example, in the registrant's annual meeting proxy statement filed in 2025, it must include non-scaled pay versus performance disclosure for fiscal year 2024. A non-SRC is required to provide Item 402(v) disclosure covering five years; however, the staff will not object if the registrant does not add disclosure for a year prior to the years included in the first filing in which it provided Item 402(v) disclosure. The registrant generally is not required to revise the disclosure for prior years (in this example, 2021, 2022, and 2023) to conform to non-SRC status in such filings. However, because peer group TSR is calculated on a cumulative basis, the registrant should include peer group TSR for each year included in the pay versus performance table, measured from the market close on the last trading day before the registrant's earliest fiscal year in the table. In addition, the registrant should include its numerically quantifiable performance under the Company-Selected Measure for each fiscal year in the table. The entirety of the Item 402(v) disclosure provided for all fiscal years must be XBRL tagged in accordance with Item 402(v) (7). [November 21, 2023]

Question 128D.29

Question: A registrant that previously qualified as an emerging growth company loses that status as of December 31, 2024. Is it required to provide pay versus performance disclosure in its proxy statement filed in 2025? How many years are required in the table?

Answer: The registrant is required to provide pay versus performance disclosure in any proxy or information statement filed after it loses its EGC status. It may apply the transitional relief in Instruction 1 to Item 402(v). [November 21, 2023]

Question 128D.30

Question: Two (or more) individuals served as a registrant's principal financial officer (PFO) during a single covered fiscal year included the pay versus performance table and related disclosure under Regulation S-K Item 402(v). Each such individual is included in the Summary Compensation table as a named executive officer (NEO) pursuant to Item 402(a)(3)(ii). For purposes of the calculation of average compensation amounts for the NEOs other than the principal executive officer reported pursuant to Items 402(v)(2)(ii) and (iii), may the registrant treat the PFOs as the equivalent of one NEO?

Answer: No. Each NEO must be included individually in the calculation of average compensation amounts. In such cases, the registrant should consider including additional disclosure on the impact of the inclusion of such individuals on the calculation in order to provide clarity to investors. [November 21, 2023]

ENDNOTE

¹ The C&DIs covering the PVP disclosure rules, including these November 2023 C&DIs, the 10 C&DIs issued and revised in September 2023 and the 15 C&DIs issued in February 2023 are contained in a [larger set of C&DIs for Regulation S-K](#). The August 2022 [adopting release](#) includes the final PVP rules.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "SEC Staff Issues New and Revised Pay-Versus-Performance Compliance & Disclosure Interpretations," dated November 27, 2023, and available [here](#).