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February 14, 2023

Corp Fin Issues 15 “Pay vs. Performance” CDIs!

On Friday, Corp Fin issued [15 new CDIs](#) for its new pay vs. performance rules. Here they are — we have taken the liberty of grouping them loosely by type of CDI so that you may more easily peruse them (with a group of the miscellaneous and technical ones grouped together at the end):

A. Peer Groups

- **Question 128D.05**

Question: For purposes of calculating peer group total shareholder return under Item 402(v)(2)(iv) of Regulation S-K, may a registrant use any compensation peer group that is disclosed in its Compensation Discussion & Analysis ("CD&A"), or is the registrant limited only to a peer group used in the CD&A for purposes of disclosing the registrant's compensation benchmarking practices under Item 402(b)(2)(xiv) of Regulation S-K?

Answer: The registrant may use a peer group that is disclosed in its CD&A as a peer group actually used by the registrant to help determine executive pay, even if such peer group is not used for "benchmarking" under Item 402(v)(2)(xiv) of Regulation S-K, as that term is explained in [CDI 118.05](#).

- **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.

B. Company Selected Measures

- **Question 128D.09**

Question: Under Item 402(v)(2)(vi), a registrant's Company-Selected Measure must be a financial performance measure that is not otherwise required to be disclosed in the Pay Versus Performance table required by Item 402(v)(1). The required financial performance measures include net income and the cumulative total shareholder return of the registrant. May a registrant provide a Company-Selected Measure that is derived from, a component of, or similar to these required measures, such as earnings per share, gross profit, income or loss from continuing operations, or relative total shareholder return?

Answer: Yes, the Company-Selected Measure can be any financial performance measure that differs from the financial performance measures otherwise required to be disclosed in the table that meets the definition of Company-Selected Measure in Item 402(v)(2)(vi) including a measure that is derived from, a component of, or similar to those required measures. Any such measures could also be included as financial performance measures in the Tabular List required by Item 402(v)(6) of Regulation S-K.

- **Question 128D.10**

Question: Would it be appropriate for a registrant to disclose its stock price as its Company-Selected Measure under Item 402(v)(2)(vi) if the registrant does not use any financial measures to otherwise link pay and financial performance, but the "compensation actually paid" reported in the Pay Versus Performance table required by Item 402(v)(1) includes the fair value of time-vested share-based awards, which value is largely tied to stock price?

Answer: No. While stock price is considered a "financial performance measure" for purposes of Item 402(v)(2)(vi), it should not be disclosed as the registrant's Company-Selected Measure if the registrant does not use it to link compensation actually paid to its named executive officers to company performance, even if it has a significant impact on the amounts reported in the Pay Versus Performance table. That is, if the only impact of stock price on a named executive officer's compensation is through changes in the value of share-based awards (which would be evident from the registrant's Summary Compensation Table disclosure), the registrant could not include its stock price as the Company-Selected measure. However, if, for example, the registrant's stock price is a market condition applicable to an incentive plan award, or is used to determine the size of a bonus pool, it may be included as a registrant's Company-Selected Measure.

- **Question 128D.11**

Question: Can the Company-Selected Measure included in the Pay Versus Performance table required by Item 402(v)(1) be measured over a multi-year period that includes the applicable fiscal year as the final year, similar to the use of multi-year measurement periods for calculating total shareholder return under Item 402(v)(2)(iv), as long as such performance period is used consistently for all years in the table?

Answer: No. Under Item 402(v)(2)(vi), the Company-Selected Measure is the measure which in the registrant's assessment represents the most important financial performance measure (that is not otherwise required to be disclosed in the table) used by the registrant to link compensation actually paid to the registrant's named executive officers, for the most recently completed fiscal year, to company performance.

- **Question 128D.12**

Question: A registrant uses a "pool plan" to determine its annual bonus awards. Under the plan, a bonus pool is available for payout only upon achievement of a financial performance measure or the size of the pool is determined based upon the extent such measure is achieved. Once that financial performance measure is achieved, the compensation committee may allocate bonus payouts to participants in its discretion, based on criteria independent of the achievement of any financial performance measure(s). If the registrant's executive compensation does not use any other financial performance measures, may the registrant omit the Tabular List required under Item 402(v)(6) of Regulation S-K and the Company-Selected Measure required under Item 402(v)(2)(vi) of Regulation S-K and the related relationship disclosure required under Item 402(v)(5)(iii) of Regulation S-K from its disclosure under Item 402(v)?

Answer: No. Because the size of the bonuses paid from the "bonus pool" is determined based wholly or in part on satisfying the financial performance measure, the registrant is using the financial performance measure to link the executive compensation actually paid to company performance within the meaning of Item 402(v)(2)(vi) and Item 402(v)(6).

C. Pay vs. Performance Table

- **Question 128D.03**

Question: Item 402(v)(3) of Regulation S-K requires, for each amount disclosed in columns (c) and (e) of the Pay Versus Performance table, footnote disclosure of each of the amounts deducted and added pursuant to Item 402(v)(2)(iii). Is footnote disclosure required for each of the fiscal years presented in the table?

Answer: Item 402(v) footnote disclosure for years other than the most recent fiscal year included in the Pay Versus Performance table would be required only if it is material to an investor's understanding of the information reported in the Pay Versus Performance table for the most recent fiscal year, or of the relationship disclosure provided under Item 402(v)(5). However, in the registrant's first Pay Versus Performance table under the new rules, the registrant should provide footnote disclosure for each of the periods presented in the table.

- **Question 128D.04**

Question: Item 402(v)(3) of Regulation S-K requires, for each amount disclosed in columns (c) and (e) of the Pay Versus Performance table, footnote disclosure of each of the amounts deducted and added pursuant to Item 402(v)(2)(iii). May a registrant satisfy this requirement by providing the aggregate amount calculated for pension value adjustments under Item 402(v)(2)(iii)(B)(1) and equity award adjustments under Item 402(v)(2)(iii)(C)(1)?

Answer: No. The registrant should provide footnote disclosure of each of the amounts deducted and added pursuant to Items 402(v)(2)(iii)(B)(1)(i) – (ii) and Items 402(v)(2)(iii)(C)(1)(i) – (vi).

- **Question 128D.08**

Question: Item 402(v)(2)(v) requires "net income" to be included in column (h) of the Pay Versus Performance table required by Item 402(v)(1). May a registrant use other net income amounts presented in the audited financial statements? For example, may a registrant that consolidates subsidiaries that are not wholly-owned use net income attributable to the controlling interest or registrant to satisfy this requirement? May a registrant with material discontinued operations during the fiscal year use income or loss from continuing operations to satisfy this requirement?

Answer: No. The registrant is required to provide in column (h) its net income or loss as required by Regulation S-X to be disclosed in the registrant's audited GAAP financial statements.

D. Other

- **Question 128D.01**

Question: Is the information required pursuant to Item 402(v) of Regulation S-K required to be included in Form 10-K, given that Item 11 of Form 10-K indicates that the registrant is required to furnish the information required under Item 402 of Regulation S-K?

Answer: No. Item 402(v) of Regulation S-K provides that the information required thereunder must be provided in connection with any proxy or information statement for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S-K, and Instruction 3 to Item 402(v) specifies that the information provided under Item 402(v) of Regulation S-K will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

- **Question 128D.02**

Question: In calculating the equity award adjustments required by Item 402(v)(2)(iii)(C)(1), are equity awards granted to a first-time named executive officer ("NEO") in a year prior to (and not otherwise related to) their appointment as a NEO required to be included? For example, if a non-NEO employee is granted a stock option in year 1, and subsequently appointed as a NEO in year 2, must that NEOs "compensation actually paid" in year 2 reflect the adjustments required by subparagraphs (ii), (iv) or (v) (relating to prior fiscal year awards) of Item 402(v)(2)(iii)(C)(1) with respect to the stock option granted in year 1?

Answer: Yes. Although such awards may not be reported in the Summary Compensation Table required by Item 402(c) (see [Question 119.01](#)), the change in value of such awards during the executive's tenure as a NEO should be included in the calculation of compensation actually paid.

- **Question 128D.06**

Question: What time period is a registrant required to present under Item 402(v) of Regulation S-K for its cumulative total shareholder return ("TSR") and peer group TSR when the registrant went public during the earliest year included in the "Pay Versus Performance" table?

Answer: Consistent with the calculation of TSR under Item 201(e) of Regulation S-K, if the class of securities was registered under Section 12 of the Exchange Act during the earliest year included in the "Pay Versus Performance" table, the "measurement point" for purposes of calculating TSR and peer group TSR should begin on such registration date.

- **Question 128D.13**

Question: If a registrant has multiple principal executive officers ("PEOs") in a fiscal year, Item 402(v) requires the registrant to provide separate columns for each PEO in the Pay Versus Performance table required by Item 402(v)(1). May the registrant aggregate (i.e., use the total sum of) the compensation of such PEOs in a given year for purposes of the narrative, graphical, or combined comparison between compensation actually paid and total shareholder return ("TSR"), net income, and the Company-Selected Measure provided under Item 402(v)(5)?

Answer: To the extent the presentation will not be misleading to investors, the staff will not object if a registrant aggregates the PEOs' compensation for purposes of the narrative, graphical, or combined comparison between compensation actually paid and TSR, net income, and the Company-Selected Measure.

- **228D.01** If a company changes its fiscal year during the time period covered by the Item 402(v) Pay Versus Performance table, provide the disclosure required by Item 402(v) for the "stub period," and do not annualize or restate compensation. For example, in late 2022, a company that is not a Smaller Reporting Company changed its fiscal year end from June 30 to December 31. In the registrant's first Pay Versus Performance table, provide disclosure for each of the following four periods: July 1, 2022 to December 31, 2022; July 1, 2021 to June 30, 2022; July 1, 2020 to June 30, 2021; and July 1, 2019 to June 30, 2020. Continue providing such disclosure including the stub period until there is disclosure for five full fiscal years after the stub period. This is consistent with the approach applicable to Summary Compensation Table disclosure for changes in fiscal year end. See [Question 217.05](#).
- **228D.02** A registrant emerged from bankruptcy, and a new class of stock that was issued under the bankruptcy plan started trading in September 2020. Registrant is preparing its first Pay Versus Performance disclosure for inclusion in its 2023 proxy statement. Consistent with [Question 206.14](#), registrant will be presenting less than five full years of data in its stock performance graph under Item 201(e) using a measurement period for the graph from September 2020 through December 2022. For

purposes of the requirement in Item 402(v)(2)(iv), the registrant may provide its cumulative total shareholder return and peer group cumulative total shareholder return in the same manner. The registrant should provide footnote disclosure to explain the approach and its effect on the Pay Versus Performance table.

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