Blogs
November 29, 2023
Corp Fin Issues 15 New (and Three Revised) CDIs!

Over the week leading up to Thanksgiving, Corp Fin issued a bunch of new CDIs – and three revised CDIs – in a variety of areas in several different tranches, including:

- One revised Proxy CDI about calculating the counting of "10 calendar days" for Rule 14a-6, clarifying that the filing date does not count as day 1 if the filing is submitted after 5:30 p.m. Eastern Time
- One new Rule 14a-12 CDI about the legend information required in solicitations before furnishing a proxy statement
- Three new Universal Proxy CDIs addressing how to handle overvoted and undervoted universal proxy cards
- One new Schedule 14A CDI about when a proposal "involves" another matter within the meaning of Note A to Schedule 14A when information about the other matter that is called for by Schedule 14A is material to a voting decision on the proposal
- Two new CDIs on exhibits; one relating to filing fees and one about linking to XBRL exhibits
- Eight new CDIs – and two revised ones – on the pay vs. performance rules

Here they are in full:

Proxy Rules and Schedule 14A

Question 126.03

Question: How are "days" counted for purposes of the "10 calendar day" period in Rule 14a-6?

Answer: For purposes of calculating the "10 calendar day" period in Rule 14a-6, the date of filing is day one pursuant to Rule 14a-6(k). For example, if the preliminary proxy statement is filed on Friday, October 20, 2023, then Sunday, October 29, 2023, would be day ten for purposes of Rule 14a-6. The registrant may send the definitive proxy statement to security holders starting at 12:01 a.m. on October 30, 2023. The foregoing assumes that the preliminary proxy statement is submitted on or before 5:30 p.m. Eastern Time on October 20, 2023. If the filing is submitted after 5:30 p.m., the 10-day period does not start until the next business day, which would be Monday, October 23, 2023. See Rule 13(a)(2) of Regulation S-T. [November 17, 2023]

Question 132.03

Question: Rule 14a-12 permits solicitations before the furnishing of a proxy statement, provided that, among other things, written soliciting material includes the required participant information or a prominent legend advising shareholders where they can find that information. See Rule 14a-12(a)(1)(i). Can a soliciting party satisfy Rule 14a-12(a)(1)(i) through a legend that only includes a general reference to filings made by the soliciting party or the participants (e.g., a legend that refers shareholders to the prior year annual report on Form 10-K and proxy statement for participant information)?

Answer: No. Rule 14a-12(a)(1)(i) requires a soliciting party to disclose the "identity of the participants in the solicitation…and a description of their direct or indirect interests, by security holdings or otherwise, or a prominent legend in clear, plain language advising security holders where they can obtain that information." The availability of participant information allows shareholders evaluating soliciting materials to understand the interests of those soliciting the shareholders at the time when the solicitations occur, including before the shareholders receive a proxy statement. When the Commission amended Rule 14a-12 to expand the ability to solicit before furnishing a proxy statement, the Commission cited the legend information as one of the safeguards to protect against misleading solicitations and maintain the integrity of the solicitation process. See Section II.C.1. in Release No. 34-42055 (Oct. 22, 1999). General references in the legend to filings made or to be made by the soliciting party or participants do not sufficiently advise shareholders where they can obtain the required participant information. Instead, the legend should:

- clearly identify the specific filing(s) where participant information appears (including by filing date);
- clearly describe the specific locations of the participant information in such filings, whether by reference to the relevant section headings, captions or otherwise; and
- include active hyperlinks to the referenced filings, when possible.

Soliciting parties also are reminded that participants' direct and indirect interests in the solicitation are not limited to such participants' security holdings. [November 17, 2023]

Question 139.07

Question: Rule 14a-19(e) mandates that each soliciting party in a non-exempt director election contest include all director nominees of all soliciting parties on each universal proxy card. As a result, in a contested director election, each soliciting party's universal proxy card will include more nominees than director seats up for election. Rule 14a-19(e)(6) mandates that a universal proxy card prominently disclose the maximum number of director nominees for whom a shareholder may grant authority to vote. Rule 14a-19(e)(7) requires that a universal proxy card prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote "for" the election of more nominees than the number of director seats up for election (an "overvoted proxy card") or fewer nominees than the number of director seats up for election (an "undervoted proxy card"). Can a soliciting party use discretionary authority to vote the shares represented by overvoted proxy cards in accordance with that party's voting recommendation for the director election?

Answer: No. Rule 14a-4(e) provides that where a person solicited specifies on a proxy card "a choice with respect to any matter to be acted upon, the shares will be voted in accordance with the specifications so made." When a shareholder has specified its choice(s) for the election of directors with an overvoted proxy card, the shares represented by an overvoted proxy card cannot as a practical matter be voted in accordance with the shareholder's specifications. Because the shareholder has specified its choice(s) for the election of directors with an overvoted proxy card, a soliciting party cannot rely on discretionary authority pursuant to Rule 14a-4(b)(1) to vote the shares represented by an overvoted proxy card on the election of directors. Although the shares represented by an overvoted proxy card cannot be voted on the election of directors, such shares can be voted on other matters included on the proxy card for which there is no overvote and can be counted for purposes of determining a quorum. The treatment and effect of the corresponding voting instruction form ("VIF") should be the same as that disclosed on a universal proxy card pursuant to Rule 14a-19(e)(7). The staff understands that some intermediaries will contact shareholders or beneficial owners to seek a correction of an overvoted proxy card or VIF before the meeting date. The interpretive position described in this CDI does not prohibit this helpful practice. [November 17, 2023]

Question 139.08

Question: Can a soliciting party use discretionary authority to vote the shares represented by undervoted proxy cards for the remaining director seats up for election in accordance with that party's voting recommendation?

Answer: No. A shareholder has specified its choice(s) for the election of directors with an undervoted proxy card, and the shares represented by an undervoted proxy card can be voted in accordance with the shareholder's specifications. See Rule 14a-4(e). Because the shareholder has specified its choice(s) for the election of directors with an undervoted proxy card, a soliciting party cannot rely on discretionary authority pursuant to Rule 14a-4(b)(1) to vote the shares represented by an undervoted proxy card for the remaining director seats up for election. The treatment and effect of the corresponding VIF should be the same as that disclosed on a universal proxy card pursuant to Rule 14a-19(e)(7). [November 17, 2023]

Question 139.09

Question: Can a soliciting party use discretionary authority to vote the shares represented by a signed but unmarked proxy card in accordance with that party's voting recommendations?

Answer: Yes. Because the shareholder has not specified any choices, the soliciting party can use discretionary authority in this manner and as permitted by Rule 14a-4(b)(1). Rule 14a-4(b)(1) states that "[a] proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the security holder," so long as the form of proxy states in bold-faced type how the proxy holder will vote where no choice is specified. Note that Rule 14a-19(e)(7) requires that a universal proxy card prominently disclose the treatment and effect of a proxy executed in a manner that does not grant authority to vote with respect to any nominees. The treatment and effect of the corresponding VIF should be the same as that disclosed on a universal proxy card pursuant to Rule 14a-19(e)(7). [November 17, 2023]

Question 151.02

Question: A registrant closes the acquisition of another company in a transaction in which security holder approval is not required. A portion of the consideration paid in the acquisition consists of convertible securities that, at the holder's option, can be converted into shares of the registrant's common stock or, at the registrant's option, cash. Following the acquisition, the registrant files a proxy statement to solicit security holder approval for the authorization of additional shares of common stock that it could issue upon the conversion of the securities issued in connection with the acquisition. Would the solicitation of security holder approval for the authorization of the additional shares of common stock "involve" the acquisition for purposes of Note A of Schedule 14A?

Answer: A proposal "involves" another matter within the meaning of Note A when information about the other matter that is called for by Schedule 14A is material to a security holder's voting decision on the proposal presented. The determination as to whether there is a substantial likelihood that a reasonable security holder would consider the information important in making a voting decision on a proposal ultimately depends on all the relevant facts and circumstances.

The authorization of additional shares of common stock is an integral part of the acquisition because it is necessary for the registrant to meet its obligation under the convertible securities issued as consideration for the acquisition. Therefore, the proposal to authorize additional shares of common stock "involves" the acquisition. In such circumstances, the registrant would have to include in the proxy statement information about the acquisition called for by Schedule 14A, unless such information has already been disclosed or sufficient time has passed so that the registrant's historical filings fully reflect the acquisition. [November 17, 2023]

Securities Act Rules

Question 239.02

Question: A well-known seasoned issuer registers securities on an automatic shelf registration statement and elects to defer payment of filing fees pursuant to Rule 456(b). The issuer subsequently files a prospectus supplement in connection with a pay-as-you-go deferred fee payment under Rules 456(b) and 457(r) that includes the required filing fee exhibit. Must the filing fee exhibit's Table 1 list all the securities listed in the initial filing of the related registration statement or is Table 1 permitted to list only the securities being offered by the prospectus supplement as to which the fees are being paid?

Answer: Table 1 must include the securities for which a deferred fee is being paid in the "Fees to Be Paid" lines. The issuer does not need to repeat previously included rows reflecting the registration of classes of securities in an indeterminate amount in reliance on Rule 457(r) in either the "fees to be paid" or "fees previously paid" lines. In addition, the issuer need not include in the "fees previously paid" line securities for which the issuer previously paid a fee that are part of (i) the same offering as those for which the issuer is paying a deferred fee; or (ii) any prior offering. [Nov. 20, 2023]

Regulation S-K

Question 146.18

Question: Item 601(a)(2) of Regulation S-K provides that an exhibit index does not need to include a hyperlink to an exhibit that is filed in XBRL. Does this exception apply to exhibits that are filed in Inline XBRL?

Answer: No. Item 601(a)(2)'s reference to exhibits filed in XBRL refers to exhibits that are filed in unconverted code, which is only machine-readable. See Release No. 33-10322 (Mar. 1, 2017). An exhibit that is tagged in Inline XBRL is not filed in unconverted code. [Nov. 20, 2023]

Section 128D. Item 402(v) — Pay Versus Performance

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). [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 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, if retirement eligibility is not the sole vesting condition, 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. [November 21, 2023]

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]

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