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SEC Staff Issues Additional Interpretive Guidance on Pay Versus Performance Disclosure Rules

06 December 2023

Overview

On November 21, 2023, the SEC staff issued additional interpretive guidance clarifying certain technical points regarding the Pay Versus Performance (“**PVP**”) disclosure rules adopted by the SEC on August 25, 2022, (summarized in our client *Alert* [linked here](#)) in the form of eight new Compliance & Disclosure Interpretations (“**C&DIs**”) and revision of two previously issued C&DIs (the full text of which can be found [here](#)).

This additional guidance comes on the heels of the 10 PVP C&DIs issued by the SEC staff in September 2023 (summarized in our client *Alert* [linked here](#)) and supplements the original 15 PVP C&DIs issued by the SEC staff in February 2023 (summarized in our client *Alert* [linked here](#)).

Most notable of the November 2023 C&DIs is the revision of one of the September 2023 C&DIs relating to equity awards containing retirement vesting provisions. A summary of this revised C&DI and the other new guidance is provided below.

Revised PVP C&DIs

Retirement Vesting. The previous version of this C&DI issued in September 2023 provided that in calculating ‘Compensation Actually Paid,’ equity awards that provide for accelerated vesting if the holder becomes retirement eligible should be reported as vested as of the date the holder becomes retirement *eligible*, unless the award has

additional substantive vesting conditions. For some registrants, this raised the question of whether, for purposes of the PVP calculations, an award with accelerated vesting upon retirement (without any other substantive vesting conditions) should be considered ‘vested’ when the holder becomes retirement eligible (which could, in certain cases, be as early as the grant date). The revised version of this C&DI clarifies that ‘other substantive conditions’ include, among other things, a market condition or a condition that provides for vesting upon the earlier of the holder’s actual retirement and the satisfaction of the applicable service period. Therefore, for purposes of calculating ‘Compensation Actually Paid,’ an award that provides for vesting upon actual retirement will be reported as ‘vested’ only if the holder has actually retired (rather than merely becoming retirement eligible). [C&DI 128D.18](#)

Compensation Peer Group Changes. The previous version of this C&DI issued in February 2023 provided that for a registrant that had used the same compensation peer group in its Compensation Discussion and Analysis (“**CD&A**”) for its proxy statements filed in 2020 and 2021 and a different compensation peer group in its CD&A for its proxy filed in 2022, the registrant’s initial PVP disclosure filed in its 2023 proxy statement must present the shareholder return (“**TSR**”) for each year in the PVP table using the peer group that was disclosed in the CD&A for each respective fiscal year. In the revised version of this C&DI, the SEC clarified that for the registrant’s 2024 proxy statement, if the registrant uses the same peer group for 2023 as it used in 2022, then that 2023 peer group should be used to calculate peer group TSR for each year included in the PVP table. If changes to the peer group are made in subsequent years, then the registrant must provide appropriate footnote disclosure of this change in accordance with Regulation S-K Item 402(v)(2)(iv). [C&DI 128D.07](#)

Newly Issued PVP C&DIs

Dividend Equivalents

In addition to dividends, any dividend equivalents paid that are not already reflected in the fair value of stock awards (or included in another component of total compensation) must be included for purposes of calculating ‘Compensation Actually Paid.’ [C&DI 128D.23](#)

Peer Group TSR

Multiple Industry or Line-of-Business Indexes. For purposes of calculating its peer group TSR in the PVP table, a registrant must use either (i) its compensation peer group presented in its CD&A or (ii) the peer group used in its stock performance graph

under Item 201(e) of Regulation S-K. If a registrant is using more than one 'published industry or line-of-business index' for purposes of Item 201(e), then the registrant may choose which 'published industry or line-of-business index' to use for purposes of its PVP disclosure and include footnote disclosure noting the selected index. Further, if the registrant uses a different industry or line-of-business index than the index used in the preceding year, the registrant must include appropriate footnote disclosure describing the reason for the change and comparing its cumulative TSR with both the newly selected peer group and the peer group used in the immediately preceding fiscal year. **C&DI 128D.24**

No Broad-Based Equity Index. A registrant may **not** use a broad-based equity index as a peer group for purposes of determining peer group TSR in its PVP disclosure. **C&DI 128D.25**

Market Capitalization-Based Weighting Requirement. The requirement to weigh the returns of the peer group issuers according to their respective stock market capitalization at the beginning of each period for which a return is indicated is only applicable if the registrant is not using an industry or line-of-business index pursuant to Item 201(e) of Regulation S-K. **C&DI 128D.26**

Peer Group Changes. If a registrant is using a peer group other than an industry or line-of-business index and adds or removes companies from the peer group, the registrant is generally required to include footnote disclosure describing the change and comparing its cumulative TSR with both the updated peer group and the peer group for the immediately preceding fiscal year. However, this comparative footnote disclosure is not required if an entity in the peer group is omitted solely because it is no longer in the line of business or industry or the changes in the composition of the peer group are the result of the application of preestablished objective criteria, but the registrant must identify the removed companies and disclose a specific description of, and the basis for, the change. **C&DI 128D.27**

Loss of SRC or EGC Status

Loss of SRC Status. Smaller reporting companies ("SRCs") are permitted to provide more limited PVP disclosures. If a registrant loses SRC status as of January 1, 2024, and had previously included the permitted scaled PVP disclosure covering fiscal years 2021 and 2022 in its proxy statement filed in 2023, the SEC will not object to the registrant providing scaled PVP disclosure for the proxy statement filed in 2024 (covering fiscal years 2021, 2022 and 2023). If the registrant does not regain SRC status, beginning with its proxy statement filed in 2025, the registrant must include

non-scaled PVP disclosure, but the SEC 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 PVP disclosure. The SEC further notes that the registrant is generally not required to revise the disclosure for prior years (in this example, 2021, 2022 and 2023) to conform to non-SRC status in those 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 PVP 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. **C&DI 128D.28**

Loss of EGC Status. An emerging growth company ("**EGC**") registrant is not required to include PVP disclosure in its proxy statements. A registrant that loses its EGC status is required to provide PVP disclosure in the first proxy or information statement filed after it loses EGC status, but will be required to include only three years (instead of five years) in its first year providing PVP disclosure (with one additional year to be reported in each of the next two subsequent annual filings in which PVP disclosure is required). **C&DI 128D.29**

Multiple Chief Financial Officers

If a registrant has multiple chief financial officers ("**CFOs**") serving during a single covered fiscal year (and both individuals were included as NEOs in the registrant's summary compensation table), each CFO must be included individually for purposes of calculating average compensation amounts in the PVP disclosure. Further, the SEC indicated that the registrant should also consider including additional disclosure regarding the impact of the inclusion of multiple CFOs on the calculations. **C&DI 128D.30**

Conclusion

This staff guidance provides some helpful clarification and confirmation on certain aspects of the PVP disclosure rules. Registrants should closely review this supplemental guidance and ensure that their PVP disclosures and calculations are consistent with these clarifications.

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Suggested Reading

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