

Corporate & Financial Weekly Digest

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SEC Issues New Interpretations Related to Executive Compensation and Say-on-Pay Reporting

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On July 8, the Securities and Exchange Commission's Division of Corporation Finance issued new Compliance and Disclosure Interpretations (C&DIs) on executive compensation disclosure and reporting with respect to the frequency of shareholder advisory votes on executive compensation (i.e., "say on pay").

The SEC's new guidance included the following:

- C&DI 121A.04 states that with respect to a company's decision as to how frequently it will include say-on-pay advisory votes in its proxy materials, an issuer may report its decision in a periodic report (i.e., Form 10-Q or Form 10-K) filed on or before the date that the Item 5.07 Form 8-K is due. If the issuer reports the voting results of an annual meeting in a Form 10-Q or Form 10-K, the issuer may file a new Item 5.07 Form 8-K, rather than an amended Form 10-Q or Form 10-K, to report its decision as to how frequently it will include say-on-pay votes in its proxy materials. However, if an issuer reports its annual meeting voting results in a Form 8-K and also intends to report its decision as to the frequency of say-on-pay votes in a Form 8-K, such decision must be reported as an amendment to the original Form 8-K, rather than as a new Form 8-K.
- C&DI 121A.03 states that under Item 5.07(b) of Form 8-K, it is not necessary to disclose the number of broker non-votes with respect to advisory votes on the frequency of say-on-pay advisory votes (although an issuer may disclose such information if the issuer believes such information would be useful to investors).
- C&DI 117.07 clarifies that under Item 402 of Regulation S-K, companies may omit disclosure of disability plans to the extent the disability plans do not discriminate in scope, terms or operation in favor of executive officers or directors and are available generally to all salaried employees.
- C&DI 118.08 clarifies that where non-generally accepted accounting principles (GAAP) financial measures are presented in Compensation Discussion & Analysis or other proxy statement disclosure for any purpose other than to disclose performance target levels,

relief from the requirements of Regulation G and Item 10(e) (including the requirement that such non-GAAP measures be reconciled to comparable GAAP measures) under Instruction 5 to Item 402(b) of Regulation S-K is not available. However, in these circumstances, the SEC will not object if a registrant includes the GAAP reconciliation and other required information in an annex to the proxy statement, provided the registrant also includes a prominent cross-reference to such annex (or, if applicable, a cross-reference to the pages of the company's Form 10-K containing the GAAP reconciliation and other required information).

- C&DI 119.28 clarifies that where target levels for performance-based equity compensation are set at the beginning of Year 1, but awards are not granted until performance results for Year 1 are determined in Year 2, the grant date fair value for equity awards must be reported based on the probable outcome of the performance condition as of the grant date, even if the actual outcome is known by the time the proxy statement is filed, in accordance with Instruction 3 to Item 402(c)(2)(v) and (vi) of Regulation S-K.

Click [here](#) to view C&DI 121A.03.

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