SEC Releases Additional Pay Versus Performance Guidance

On September 27, 2023, the SEC issued a set of nine new Regulation S-K Compliance and Disclosure Interpretations ("C&DIs") that provide additional guidance on pay versus performance disclosure requirements. See below for a summary of the SEC's new guidance:

SEC Additional Pay Versus Performance Guidance	
Question 128D.14	Awards granted (outstanding and unvested) in fiscal years prior to an equity restructuring (e.g., a spin-off), and modified or retained following such transaction must be included in the calculation of compensation actually paid ("CAP").
Question 128D.15	The change in fair value of awards granted before a company's initial public offering ("IPO") should be determined based on their fair value at the end of the prior fiscal year, not on other dates such as the date of IPO.
Question 128D.16	The effect of the market condition should be reflected in the fair value of share-based awards that include such a condition and should be considered when assessing whether the vesting conditions for these awards have been met.
Question 128D.17	Awards that have failed to vest in a given year due to unmet performance or market conditions but remain outstanding with potential future vesting, are not considered to have failed the applicable vesting conditions and should not be subtracted from CAP calculations.
Question 128D.18	In the year the holder becomes retirement eligible, if retirement eligibility is the sole vesting condition for the award, that condition is satisfied for pay vs. performance disclosure and CAP calculations.
Question 128D.19	Certification (e.g., by the Compensation Committee) should be analyzed to determine if it creates an additional substantive vesting condition (e.g., employee must remain employed through the certification date for vesting). If so, the award will not be considered vested until certification occurs.
Question 128D.20	An issuer may use a different valuation technique from that used to determine the grant date fair value for purposes of the company's financial statements, as long as the technique is in permitted under FASB ASC Topic 718. (Note: Issuer is expected to disclose any material change in valuation technique from the grant date fair value calculation, and the reasoning for the change.)

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Question 128D.21	The fair value of awards must be computed using a methodology and assumptions consistent with FASB ASC Topic 718.
Question 128D.22	It is not required to disclose detailed quantitative or qualitative performance conditions for the awards if such information would be subject to confidentiality protections (e.g., confidential trade secrets, commercial, or financial information). However, the issuer must provide as much information as possible and discuss how the material difference in the assumption affects the difficulty/likelihood for the issuer to achieve undisclosed target levels or other factors.

Contact Us

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